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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 176

HAGGAR COMPANY, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 5, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Fifth Circuit	a	1
Caption (omitted in printing)	a	
Proceedings before United States Board of Tax Appeals	1	1
Docket entries	1	1
Petition	2	2
Notation relative to Exhibit "A"	8	6
Answer to petition	8	6
Opinion, Tyson, M.	11	8
Decision	15	12
Petition for review	16	12
Assignment of errors	19	15
Joint stipulation of facts	21	16
Exhibit "A"—Letter, respondent to Haggar Company, dated March 3, 1937, with statement attached	26	20
Exhibit "B"—Photostat of capital stock tax return for year ending June 30, 1933 of Haggar Company	33	24

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	Original	Print
Proceedings before United States Board of Tax Appeals—Continued.		
Joint stipulation of facts—Continued.		
Exhibit "C"—Photostat of capital stock tax return for year ending June 30, 1933 of Haggar Company, Inc.	34	24
Exhibit "D"—Photostat of income tax return for calendar year 1933 of Haggar Company, Inc.	35	24
Exhibit "E"—Paragraph 3 of the "Instructions" attached to Form 707	39	25
Exhibit "F"—Letter, respondent to Haggar Company, dated November 4, 1936	40	25
Praecipe for record	41	26
Clerk's certificate (omitted in printing)	43	
Argument and submission	44	28
Opinion of the Court, Holmes, J.	45	28
Judgment	52	32
Petition for rehearing (omitted in printing)	53	
Order denying rehearing	55	34
Motion and order staying mandate	56	34
Clerk's certificate	59	36
Order allowing certiorari	60	37

[fol. a] [Caption omitted]

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 89265

Haggar Company, Petitioner,

versus

Commissioner of Internal Revenue, Respondent

Docket Entries

Appearances:

For Petitioner: O. D. Brundidge, Esq.
For Respondent: Joe D. Hughes, Esq., W. G. Ruymann, Esq.

1937.

May 28. Petition received and filed. Taxpayer notified. (Fee paid.)
May 29. Copy of petition served on General Counsel.
June 3. Motion for circuit hearing in Dallas, Texas, filed by taxpayer.
July 28. Answer filed by General Counsel.
July 31. Copy of answer served on taxpayer.
Aug. 2. Motion for circuit hearing in Dallas, Texas, granted.
Dec. 8. Hearing set Feb. 21, 1938, Dallas, Texas.

1938.

Jan. 25. Notice to produce the entire file Docket No. 82698 at the trial on Feb. 21, 1938, at Dallas, Texas, filed by General Counsel.
Feb. 21. Hearing had before Mr. Tyson on merits. Submitted. Stipulation of facts filed. Petitioner's brief due 3/23/38—Respondent's brief due 4/23/38—reply due 5/9/38.
Mar. 11. Transcript of hearing 2/21/38 filed.
Mar. 21. Brief filed by taxpayer. 3/21/38 copy served on General Counsel.

DOCKET ENTRIES—Continued

[fol. 2]

1938.

Apr. 15. Brief filed by General Counsel.
July 21. Opinion promulgated—John A. Tyson, Division 1. Decision will be entered under Rule 50.
Aug. 9. Computation of deficiency filed by General Counsel.
Aug. 12. Hearing set Aug. 31, 1938, on settlement.
Aug. 31. Hearing had before Mr. Black on settlement under Rule 50—referred to Mr. Tyson for decision (respondent's computation).
Aug. 31. Decision entered—John A. Tyson, Division 1.
Nov. 8. Supersedeas bond in the amount of $3,600.00 approved and ordered filed.
Nov. 8. Petition for review by U. S. Circuit Court of Appeals, Fifth Circuit, with assignments of error filed by taxpayer.
Nov. 8. Proof of service filed by taxpayer.
Nov. 9. Præcipe for record filed with proof of service thereon.

BEFORE UNITED STATES BOARD OF TAX APPEALS

PETITION—Filed May 28, 1937

The above named Taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue, set forth in his deficiency letter bearing date March 3rd, 1937 (SN-AE), and as the basis of its appeal sets forth the following:

1. The Taxpayer is a Texas corporation with its principal office and place of business in the City and County of Dallas, State of Texas.

[fol. 3] 2. The deficiency letter (copy of which is hereto attached, marked Exhibit "A" and made a part hereof) was mailed to the Taxpayer March 3rd, 1937, and states a deficiency of $382.49 of income tax, and a deficiency of $1376.52 of excess profits tax liability, a total of $1759.01.

3. The taxes in controversy are income and excess profits taxes for the calendar year 1933 in the total sum of $1759.01.

4. The determination of tax contained in the said deficiency letter is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in assessing an excess profits tax for the year 1933 against petitioner in the sum of $1376.52.

(b) The Commissioner of Internal Revenue erred in failing and refusing to accept the capital stock tax return filed September 28th, 1933, declaring the value of the capital stock of said corporation to be $250,000.00.

(c) The Commissioner of Internal Revenue erred in refusing to accept the check of the Petitioner in the sum of $250.00, tendered as payment of its capital stock tax to the Collector of Internal Revenue on September 28th, 1933.

(d) The Commissioner of Internal Revenue erred in failing and refusing to return to the Taxpayer its erroneous purported capital stock tax return filed August 23rd, 1933, and in failing and refusing to refund the payment of $120.00 erroneously tendered by Taxpayer at that time in payment of its capital stock tax.

[fol. 4] (e) The Commissioner of Internal Revenue erred in computing the excess profits tax of Taxpayer upon the declared value of its capital stock of $120,000.00 instead of $250,000.00 as set out in its capital stock tax return filed with the Collector of Internal Revenue on September 28th, 1933; said return having been filed within the time required by law for the filing of first return under Section 215(f) of the National Industrial Recovery Act, Approved June 16, 1933.

(f) The Commissioner of Internal Revenue erred in disallowing as a deduction in the computation of net income of the $250.00 capital stock tax paid to the Collector of Internal Revenue on the basis of its capital stock tax return on Form 707, filed with the Collector of Internal Revenue at Dallas, Texas, on September 28th, 1933.

(g) The Commissioner of Internal Revenue erred in allowing as a proper deduction in accordance with Office Decision (I. T.) 2827, Cumulative Bulletin XIII-2, the capital stock tax accrued as at July 1, 1933, on the basis of the capital stock tax return filed by petitioner on August 23rd,

1933, instead of computing the same upon the return filed September 28th, 1933.

5. The facts upon which the Taxpayer relies as the basis of its appeal are as follows:

(a) Taxpayer is a corporation, organized under the laws of the State of Texas, and was in existence prior to January 1st, 1933.

(b) Pursuant to Section 215(f) of the National Industrial Recovery Act and in accordance with Regulation 64, Art. 24, and within the time prescribed by the Commissioner in Regulation 64, Art. 55 (as amended by Treasury Decision 4386, dated August 24th, 1933), on to-wit the 28th day of [fol. 5] September, 1933, Taxpayer filed its First Capital Stock Tax Return declaring the value of its capital stock of $250,000.00, and tendered its check for $250.00, in payment of the tax of $1.00 per thousand, to the Collector of Internal Revenue for the Northern District of Texas at Dallas.

(c) Prior thereto, on or about August 23rd, 1933, an employee of Taxpayer erroneously filed a Capital Stock Tax Return stating the value of the stock at $120,000.00, and tendered Taxpayer's check for $120.00 in payment of the capital stock tax return. This return was filed before the promulgation of Treasury Decision 4386, dated August 24th, 1933, setting the time for filing such capital stock tax return to September 29th, 1933. This first purported return was prepared by an employee of Taxpayer before the officials of Taxpayer had learned the declared meaning of term "declared value," and before Taxpayer was aware that excess profits taxes would be computed upon such purported "declared value." The corrected return, filed September 28th, 1933, was made in good faith upon the advice of Petitioner's tax accountant.

(d) Under the National Industrial Recovery Act, Sec. 215(f), the original date for filing capital stock tax return was on or before July 31st, 1933. A blanket extension of time was allowed to August 31st, 1933, by Treasury Decision 4368 XII-1 C. B. 473, and a further extension to September 29th, 1933, was granted by Treasury Decision 4386, found in XII-2 C. B. 404. The corrected return for the period ending July 1st, 1933, was filed on September 28th, 1933, within

the time granted by the extension in Treasury Decision 4386.

(e) Regulation 64 under which the Commissioner claims that the first purported return submitted by Taxpayer cannot be amended, was not promulgated until August 15th, 1933.

[fol. 6] (f) The proposal to recommend the assessment of this deficiency tax was first made by Internal Revenue Agent in Charge at Dallas, Texas, in letter dated November 19th, 1935, to which Taxpayer filed its protest dated December 31st, 1935.

(g) The Commissioner of Internal Revenue erroneously assessed a deficiency excess profits tax of $1376.52, based on the purported capital stock tax return filed August 23rd, 1933, although Taxpayer within the time extended by law filed its Corrected First Capital Stock Tax Return under the National Industrial Recovery Act on August 28th, 1933, and paid a tax of $250.00 based on the declared value of its capital stock of $250,000.00.

(h) The Commissioner of Internal Revenue has retained, and still retains, the $250.00 tendered by Taxpayer as its capital stock tax in connection with its return filed September 28th, 1933, within the time prescribed by the Commissioner of Internal Revenue.

(i) In view of the fact that this was a new and unusual law and was not approved until June 16th, 1933, and that Taxpayer had had no opportunity to familiarize itself with the meaning and the peculiarities of said law, and since the Treasury Department recognized the right of all taxpayers to an extension of time within which to familiarize themselves with the terms and conditions of the new Act, the filing of Taxpayer's return on September 28th, 1933, was in contemplation of law and the regulations thereunder, its first return and the amount of $250,000.00 declared therein as the value of its capital stock was the proper amount upon which to base its capital stock tax, the computation of its income tax and the computation of its excess profits tax, if any. The Commissioner of Internal Revenue [fol. 7] should therefore determine Petitioner's income tax, its capital stock tax and its excess profits tax for the year 1933 under the provisions of said Section 215(f) of the

National Industrial Recovery Act and the applicable Regulations thereunder and the Treasury Decision above referred to, extending the time for the filing of capital stock tax return and payment of such tax until September 29th, 1933.

Wherefore, Taxpayer respectfully prays that the Board may hear and determine its appeal. Taxpayer further prays that:

(a) The Board may find that there is no deficiency excess profits tax due from Petitioner for the year 1933, and that its return filed September 28th, 1933, was in contemplation of law its "First Capital Stock Tax Return" under the National Industrial Recovery Act; that the Board may give and grant Petitioner such other and further relief as in the premises the Board may deem fit and proper, including refund of $120.00 capital stock tax erroneously paid by it on August 23rd, 1933; and,

(b) Petitioner prays, in the alternative, that in case the Board shall find that the capital stock tax return filed by it September 28th, 1933, was not its first return under the National Industrial Recovery Act, for the year 1933, it shall order and direct that a refund with interest be made to Petitioner for the said sum of $250.00 capital stock tax paid by it at the time of filing such return.

O. D. Brundidge, Counsel for Petitioner, Republic Bank Building, Dallas, Texas. Of Counsel: Burgess, Chrestman & Brundidge, Republic Bank Building, Dallas, Texas.

[fol. 8] *Duly sworn to by J. M. Haggar. Jurat omitted in printing.*

For Exhibit "A" referred to herein see Exhibit "A" attached to Stipulation of Facts.

BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER

Received July 28, 1937

Filed July 28, 1937

Comes now the Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of

Internal Revenue, and for answer to the petition filed in [fol. 9] the above-entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1 of the petition.

2. Admits the allegations contained in Paragraph 2 of the petition.

3. Admits the allegations contained in Paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraphs (a) to (g), inclusive, of Paragraph 4 of the petition.

5. Admits the allegations of fact contained in subparagraphs (a), (e) and (f); denies the allegations of fact contained in subparagraphs (b), (g) and (i) of Paragraph 5 of the petition. With reference to subparagraph (c), admits that on or about August 23, 1933, the taxpayer filed a capital stock tax return stating the value of the stock at $120,000.00, and tendered taxpayer's check for $120.00 in payment of such capital stock tax; and also admits that Treasury Decision 4386, dated August 24, 1933, extended the time for taxpayers to file capital stock tax returns to September 29, 1933. Denies the remaining allegations contained in subparagraph (c) of Paragraph 5 of the petition. With reference to subparagraph (d), admits that under the National Industrial Recovery Act, Section 215 (d), the original date for filing capital stock tax returns was on or before July 31, 1933, and that an extension of time was allowed to August 31, 1933, by Treasury Decision 4368, XII-1 C. B., 473, and a further extension to September 29, 1933, was granted to [fol. 10] taxpayers by Treasury Decision 4386, found in XII-2, C. B., 404; denies the remaining allegations contained in subparagraph (d) of Paragraph 5 of the petition. With reference to subparagraph (h), neither admits nor denies, inasmuch as the questions of whether taxpayer made an overpayment of its capital stock tax and whether it is entitled to a refund of capital stock tax are matters not within the jurisdiction of the Board of Tax Appeals.

Denies that petitioner is entitled to the relief prayed for in subparagraphs (a) and (b) which appear at the end of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

(Signed) Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue. Of Counsel: Frank M. Thompson, Jr., Loren P. Oakes, Special Attorneys, Bureau of Internal Revenue.

[fol. 11] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 89265. Promulgated July 21, 1938

HAGGAR COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Held, that the declaration of value of petitioner's capital stock as contained in its first capital stock tax return filed on August 22, 1933, pursuant to sections 215 (f) and 216 (a) of the National Industrial Recovery Act, may not be amended by a second capital stock tax return filed on September 28, 1933. William A. Webster Co., 37 B. T. A. 800, followed, despite a ruling to the contrary in Glenn v. Oertel Co., — Fed. (2d) — (C. C. A., 6th Cir., June 8, 1938).

O. D. Brundidge, Esq., for the petitioner.
Joe D. Hughes, Esq., for the respondent.

OPINION

TYSON:

For the calendar year 1933 the respondent determined a deficiency of $382.49 in income tax and a deficiency of $1,376.52 in excess profits tax against the petitioner herein.

This proceeding has been submitted upon a stipulation of facts which, together with the exhibits attached thereto, is adopted as our findings of fact and included herein by reference.

The petitioner concedes as correct the deficiency of $382.49 in income tax. The sole issue is whether the petitioner may

file a second or amended capital stock tax return for the year ending June 30, 1933, and thereby amend the declared value of its capital stock as reported in its first or original capital stock tax return for that year.

[fol. 12] The petitioner, a Texas corporation, was in existence and doing business during the year 1933, and prior thereto, with its principal office and place of business in Dallas, Texas.

Pursuant to section 215 (d) and (f) and section 216 (a) of the National Industrial Recovery Act, 48 Stat. 195. 208,[1]

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[1] See. 215 (d). Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed * * *. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

* * * * * * *

Sec. 215 (f). For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value can not be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year

the petitioner on August 22, 1933, filed a capital stock tax return for the year ended June 30, 1933, setting out an original declared value of $120,000 for its entire capital stock, which was the par value thereof. Simultaneously the petitioner paid to the collector of internal revenue the capi- [fol. 13] tal stock tax of $120 shown to be due on that return. In filing the return the petitioner assumed that the law contemplated the declaration of the par value of its capital stock as shown by its charter rather than its actual value and the petitioner failed to give consideration to paragraph 3 of the "Instructions" attached to form 707, upon which the return was made.

Within the time for filing capital stock tax returns for the year ended June 30, 1933, as extended by Treasury Decisions 4368 and 4386, the petitioner filed, on September 28, 1933, a second capital stock tax return for that year, in which it declared the value of its capital stock to be $250,000. On the same date it paid to the collector of internal revenue the capital stock tax of $250 shown to be due on that return. Such return was accepted by the collector on the assumption that it was for a corporation other than this petitioner, but upon disclosure that the two returns filed on August 22 and September 28, 1933, respectively, were for the same corporation, the petitioner was advised that the second return could not be accepted.

On or about August 9, 1937, the petitioner filed a claim for refund for the capital stock tax of $120 paid on August

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ending at or prior to the close of the year for which the tax is imposed by this section. • • •

• • • • • • • •

Sec. 216 (a). There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock • • • as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

22, 1933, and the claim was rejected by the Commissioner on November 26, 1937.

On or about August 13, 1937, the petitioner filed a conditional claim for refund of the capital stock tax of $250 paid on September 28, 1933, and on or about December 24, 1937, the Commissioner tendered a Treasury check payable to petitioner in the amount of $312.58 as a refund of the capital stock tax of $250 plus interest. The petitioner has not cashed that check and the petitioner's tender of the check back to the Government has been refused.

[fol. 14] On March 15, 1934, the petitioner filed its "Corporation income tax and excess-profits tax return for the calendar year 1933", form 1120, on which it inadvertently computed its excess profits tax exemption at 12½ per cent of $370,000, the total declared value shown in the two above mentioned capital stock tax returns. The petitioner now claims that its excess profits tax exemption should have been computed at 12½ per cent of $250,000, the declared value of its capital stock as set out in its second capital stock tax return filed on September 28, 1933.

In determining the deficiency in excess profits tax, here in controversy, the respondent computed the exemption at 12½ per cent of $120,000, the declared value of petitioner's capital stock as shown in its original capital stock tax return filed on August 22, 1933.

The question here presented was considered at length and decided adversely to petitioner's contention in William A. Webster Co., 37 B. T. A. 800, and, with due respect for the United States Circuit Court of Appeals for the Sixth Circuit, we adhere to the rule there announced despite the contrary conclusion reached by that Court in Glenn v. Oertel Co., — Fed. (2d) — (June 8, 1938).

On brief and in one paragraph of four lines the petitioner presents the contention that the applicable provisions of the National Industrial Recovery Act are unconstitutional if the tax is to be levied on the value of its capital stock as declared by the taxpayer rather than on its actual value. This raises a moot question here, since the pleadings raise no issue as to the actual value of the stock and the proof does not show its actual value. Moreover, the petitioner has failed to cite any authority in support of this contention or to make any argument with reference thereto and it is not apparent to us that the question of the constitutionality of the statute is so doubtful as to justify a holding that it is

unconstitutional. Cf. Rita O'Shaughnessy, Executrix, 21 B. T. A. 1046; affd., 60 Fed. (2d) 235; certiorari denied, 288 [fol. 15] U. S. 605. See also Chicago Telephone Supply Co. v. United States, — Ct. Cls. —; — Fed. Supp. — (May 31, 1938), wherein the United States Court of Claims held a later identical statute to be constitutional.

Decision will be entered under Rule 50.

(Seal.)

Before United States Board of Tax Appeals

Docket No. 89265

Haggar Company, Petitioner,

vs.

Commissioner of Internal Revenue, *Respondent*

Decision

Pursuant to the Board's Opinion promulgated July 21, 1938, in the above entitled proceeding, the respondent having duly filed a proposed recomputation in accordance therewith, and the petitioner having failed, after due notice, to file a counter proposed recomputation or to object, at the hearing on August 31, 1938, to the recomputation as made by the respondent, it is hereby

Ordered and Decided that, for the year 1933, there is a deficiency of $382.49 in income tax and $1,376.52 in excess-profits-tax.

Enter: Entered Aug. 31, 1938.

(Signed) John A. Tyson, Member. (Seal.)

[fol. 16] Before United States Board of Tax Appeals

Petition of Haggar Company for Review by the Circuit Court of Appeals of the United States for the Fifth Circuit of a Decision by the United States Board of Tax Appeals—Filed Nov. 8, 1938

Taxpayer, the petitioner in this Cause, by O. D. Brundidge, counsel, hereby files its petition for a review by the Circuit

Court of Appeals of the United States, for the Fifth Circuit, at New Orleans, Louisiana, of the decision by the United States Board of Tax Appeals rendered on the 31st day of August, 1938, 38 B. T. A. 141, determining deficiencies in the petitioner's Federal income and excess profits taxes for the calendar year 1933, in the respective amounts of $382.49 income tax and $1,376.52 excess profits tax, and respectfully shows:

I

The petitioner, Haggar Company, is a corporation, duly organized and existing under and by virtue of the laws of the State of Texas, with its principal office in the City and County of Dallas, State of Texas.

Notice of filing this petition for review has been served upon Chief Counsel of the Bureau of Internal Revenue, Washington, D. C.

II

Nature of the Controversy

The controversy involves a proper determination of the petitioner's liability for Federal income taxes and excess profits taxes for the calendar year 1933.

[fol. 17] The petitioner is a corporation, incorporated and existing under and by virtue of the laws of the State of Texas, with its principal office and place of business in Dallas, Dallas County, Texas. It was in existence and doing business during the year 1933 and prior thereto.

Pursuant to Sections 215 (d) and (f), and Section 216 (a) of the National Industrial Recovery Act, 48 Stat. 195, 208, the petitioner on August 22, 1933, filed, upon the form provided by the Collector of Internal Revenue, a capital stock tax return for the year ended June 30, 1933, in which was set out the par value of the capital stock of the corporation at its declared value of $120,000.00. Simultaneously with the filing of said instrument the petitioner paid to the Collector of Internal Revenue at Dallas, Texas, the sum of $120.00, being $1.00 per thousand of the par value of its stock. In filing the return the petitioner assumed that the law contemplated the declaration of the par value of its capital stock as shown by its charter rather than its actual value.

Within the time for filing capital stock tax returns for the year ended June 30, 1933, as extended by Treasury Decisions Nos. 4368 and 4386, its attention having been called

to the purpose and meaning of the Act, the petitioner filed on September 28, 1933, its first capital stock tax return for that year, in which it declared the value of its capital stock to be $250,000.00, based upon the actual value of the earning ability of the company's assets. On the same date the petitioner paid to the Collector of Internal Revenue at Dallas, Texas, capital stock tax of $250.00 shown to be due on that return, and such return was accepted by the Collector. On March 15, 1934, the petitioner filed its "Corporation Income and Excess Profits Tax Return" for the calendar year 1933, Form 1120, showing a net income of the petitioner for the taxable year of 1933 to be $39,748.59, and an income tax lia-
[fol. 18] bility of $5,465.43, which the taxpayer seasonably paid to the Collector of Internal Revenue for the Second District of Texas, at Dallas.

In its corporation, income and excess profits tax return for the calendar year 1933 your petitioner computed its excess profits tax exemption at the sum of $45,250.00, which was based upon 12½ per cent of $370,000.00, the total declared value shown in the two capital tax returns filed by it. The petitioner claims that its excess profits tax exemption should have been computed at 12½ per cent of $250,000.00, the declared value of its capital stock tax as set out in its capital stock tax return filed September 28, 1933, amounting to the sum of $31,250.00 leaving an excess profit of $8,428.79, upon which an excess profits tax of 5 per cent, amounting to $424.93 accrued, which the taxpayer conceded to be due and is willing to pay.

The deficiency of $382.49 of income tax liability for the tax year 1933 has not been contested by the petitioner and is not in issue here.

On or about August 9, 1937, petitioner filed in the office of the Collector of Internal Revenue at Dallas its application and claim for refund of the sum of $120.00 paid by it on August 22, 1937.

The petitioner's claim for refund of $120.00 capital stock tax paid was rejected by the Commissioner of Internal Revenue on November 26, 1937.

The deficiency letter assessing a deficiency of $1,376.52 of excess profits tax liability was mailed to the taxpayer on March 3, 1937.

III

The said Haggar Company, petitioner, being aggrieved by the findings of fact and conclusions of law contained in

[fol. 19] the said findings and opinion of the Board of Tax Appeals and by its decision entered pursuant thereto, desires to obtain a review thereof by the Circuit Court of Appeals of the United States for the Fifth Circuit, at New Orleans.

IV

Assignments of Error

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

(1) The failure to find that the petitioner's return filed September 28, 1933, was its first return under Clause (d), of Section 215 of the National Industrial Recovery Act.

(2) The failure to find that the Commissioner of Internal Revenue erred in failing and refusing to retain and confirm his acceptance of the capital tax stock return filed September 28, 1933, declaring that the value of the capital stock of said corporation to be $250,000.00.

(3) The failure to find that the Commissioner of Internal Revenue should have retained and continued to accept the check of the petitioner in the sum of $250.00 tendered as payment of his capital stock to the Collector of Internal Revenue on September 28, 1933.

(4) The failure to find that the Commissioner of Internal Revenue erred in failing and refusing to return to the taxpayer its erroneous purported capital stock tax return filed August 23, 1933, and in failing and refusing to refund to the petitioner the payment of $120.00 erroneously tendered at that time by the taxpayer.

(5) The failure to find that the Commissioner of Internal Revenue erred in computing the excess profits tax [fol. 20] of the petitioner upon the value of $120,000.00, instead of upon its declared value of $250,000.00 as set out in its first capital stock tax return filed September 28, 1933.

(6) The failure to allow the petitioner, as a deduction in the computation of its net income, of the $250.00 capital stock tax paid to the Collector of Internal Revenue on September 28, 1933.

(7) The failure to find that the Commissioner of Internal Revenue erred in determining the deficiency in

excess profits tax by computing the petitioner's exemption of 12½ per cent of $120,000.00 instead of computing said exemption at 12½ per cent of $250,000.00, as shown in its original capital stock tax return filed September 28, 1933.

(8) The finding of a deficiency of $1,376.52 in excess profits tax against the petitioner herein for the year 1933.

(9) In finding that the taxpayer's excess profits tax should be computed upon its errors rather than upon its income.

(10) In failing to compute the petitioner's excess profits tax in accordance with its first correct capital stock tax return filed September 28, 1933.

O. D. Brundidge, Counsel for Petitioner, 2003 Republic Bank Bldg., Dallas, Texas.

[fol. 21] *Duly sworn to by O. D. Brundidge. Jurat omitted in printing.*

Before United States Board of Tax Appeals

STIPULATION OF FACTS—Filed February 21, 1938.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts may be taken as true, and that the same may be considered by the Board as offered in evidence by the parties to these proceedings; provided, however, that this stipulation shall be without prejudice to the right of either of the parties to these proceedings to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The taxpayer is a Texas corporation, incorporated and existing under the name of Haggar Company, with its principal office and place of business in the City of Dallas, State of Texas. The taxpayer corporation was in existence [fol. 22] and doing business prior to January 1, 1933, and continued to do business during that year.

2. The notice of deficiency, copy of which is attached hereto and made a part hereof and marked Exhibit A, was mailed to the taxpayer within the statutory period on

March 3, 1937, and states a deficiency of $382.49 of income tax liability, and a deficiency of $1,376.52 of excess profits tax liability, a total of $1,759.01.

3. The petition in the present case was filed with the United States Board of Tax Appeals on May 28, 1937, within the time prescribed by law.

4. On August 22, 1933, the taxpayer, pursuant to Section 215 (d) and (f) of the National Industrial Recovery Act, approved June 16, 1933, filed with the Collector of Internal Revenue for the Second District of Texas at Dallas, Texas, a capital stock tax return for the year ending June 30, 1933, setting out an original declared value for its entire capital stock of $120,000, being the par value of $1,200 shares of its common stock issued and outstanding at that time at $100 per share. Simultaneous with the filing of said return, the taxpayer paid to the Collector of Internal Revenue at Dallas, Texas, the sum of $120 being the tax shown to be due thereon. A copy of such return is attached hereto and made a part hereof and marked Exhibit B. That said return was filed by the taxpayer upon the assumption that the law contemplated the declaration of the par value of the capital stock of the corporation as shown by its charter, and not its actual value; and taxpayer did not give consideration to Paragraph 3 of the "Instructions" attached to Form 707 upon which said return was made. A copy of such "Instruc-[fol. 23] tions" is hereto attached and marked Exhibit E for identification.

5. Under the terms of the National Industrial Recovery Act, Section 215 (d), the original date for filing capital stock tax returns thereunder was fixed on or before July 31, 1933. By T. D. 4368 (C. B. XII-1, page 473) and the third paragraph of Article 55 of Regulations 64, promulgated August 15, 1933, an extension to on or before August 31, 1934, was granted in the case of returns required to be filed in the continental United States, and a further extension to on or before September 29, 1933, was granted by T. D. 4386 (C. B. XII-2, page 404). The third paragraph of article 55 of regulations 64 was thereby amended to read as follows:

"The time for filing all returns for the year ended June 30, 1933, is extended to on or before September 29, 1933."

6. On September 28, 1933, the taxpayer, in good faith and upon the advice of its tax consultant, filed a second capital stock tax return for the year ending June 30, 1933, declaring the value of its capital stock at $250,000, and on the same date paid to the Collector of Internal Revenue for the Second District of Texas, Dallas, Texas, the sum of $250 as payment of the capital stock tax shown to be due thereon at the rate of $1 per one thousand of said declared value. Attached hereto and made a part hereof and marked Exhibit C is a true and correct photostatic copy of the capital stock tax return filed September 28, 1933. Said return was accepted by the Collector on the assumption that there were two corporations, one return being filed in the name of Haggar Company and the other in the name of The Haggar Company, Inc. However, when it was disclosed that the returns were for the same corporation, [fol. 24] the taxpayer was advised that the second return could not be accepted, and that it was at liberty to file claim for refund for the excess tax paid. Attached hereto and made a part hereof and marked Exhibit F is a copy of a letter of November 4, 1936, from Deputy Commissioner Bliss to the taxpayer.

7. On March 15, 1934, the petitioner filed its "Corporation income and excess profits tax return for the calendar year 1933," Form 1120, a true and correct photostatic copy of which is attached hereto, marked Exhibit D, four pages, and made a part hereof.

8. Said corporation income and excess profits tax return filed by the petitioner for the taxable year 1933 (Exhibit D) showed a net income of the petitioner for the taxable year 1933 of $39,748.59, and an income tax liability of $5,465.43, which the taxpayer seasonably paid to the Collector of Internal Revenue for the Second District of Texas at Dallas, Texas.

9. In its corporation income and excess profits tax return for the calendar year 1933 (Exhibit D), the petitioner computed its excess profits tax exemption at the sum of $45,250, which was based upon 12½% of $370,000, the total declared value shown in the two capital stock tax returns filed by it (Exhibit D, line 33). The petitioner now claims that its excess profits tax exemption should have been computed at 12½% of $250,000, the declared value of its capital

stock as set out in its second capital stock tax return filed September 28, 1933, amounting to the sum of $31,250, leaving an excess profit of $8,498.59 upon which an excess profits tax of 5% amounting to $424.93 accrued, which the taxpayer now concedes to be due and is willing to pay.

[fol. 25] 10. Petitioner further concedes as correct the determination of the respondent that a defieiency of $382.49 of income tax liability is due from it for the taxable year 1933 (Exhibit A, page 27).

11. On or about August 9, 1937, the petitioner filed in the office of W. A. Thomas, Collector of Internal Revenue for the Second District of Texas at Dallas, Texas, its application and claim for refund for the said sum of $120 paid by it on August 22, 1937.

12. Thereafter, on or about August 13, 1937, petitioner filed in the office of the Collector of Internal Revenue for the Second District of Texas at Dallas, Texas, a conditional application for refund of the $250 capital stock tax paid by it on September 28, 1933, setting out on the face of said claim as follows:

"This claim is filed for the purpose of preventing the bar of limitation in the event it shall be finally determined that the taxpayer is not entitled to a refund of $120 capital stock tax erroneously paid on August 23, 1933, the circumstances under which both payments were made are set out fully in additional sheets hereto attached and made a part of this claim."

13. Petitioner's claim for refund of $120 capital stock tax paid was rejected by the Commissioner of Internal Revenue on November 26, 1937.

14. On or about December 24, 1937, the Commissioner of Internal Revenue tendered to the petitioner check number 532309, drawn on the Treasury of the United States, payable to the Haggar Company in the sum of $312.58, as a refund of the $250 capital stock tax paid by it plus interest as allowed by law, which check has not been cashed by peti-
[fol. 26] tioner, and said check was by the taxpayer tendered back to the Government and was refused.

O. D. Brundidge, Attorney for Petitioner. J. P. Wenchel, R. E. T., Chief Counsel, Bureau of Internal Revenue.

EXHIBIT "A"

IT:E:3.
JCC-90D.

Mar. 3, 1937.

Haggar Company, Fourth Unit, Santa Fe Building, Dallas, Texas.

SIRS:

You are advised that the determination of your income tax liability for the taxable year(s) 1933 discloses a deficiency of $382.49, and that the determination of your excess profits tax liability for the year(s) mentioned discloses a deficiency of $1,376.52, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiencies mentioned. Within ninety days, not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies above stated.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting [fol. 27] an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by W. T. Sherwood, Acting Deputy Commissioner.

Enclosures: Statement. Form 870.
JCC/DM-1.

Statement

IT:E:3.
JCC-90D.

In re: Haggar Company,

Fourth Unit, Santa Fe Building,

Dallas, Texas

Tax Liability for Taxable Year 1933

	Liability	Assessed	Deficiency
Income tax	$5,847.92	$5,465.43	$382.49
Excess-profits tax	1,376.52	None	1,376.52

The deficiencies shown herein are based upon the report dated November 19, 1935, prepared by Revenue Agent Lawrence E. Cohn, a copy of which was transmitted to you, and upon such adjustments as are shown in the following schedule.

Careful consideration has been given to your protest dated December 31, 1935, in connection with the report of the internal revenue agent in charge, and the information submitted at a conference held in the office of that official.

[fol. 28] Net Income

Net income reported on return		$39,748.59
Add:		
1. Excessive deduction for bad debts	$1,793.39	
2. Excessive depreciation	21.19	
3. Bad debts recovered	942.11	
4. Capital stock tax disallowed	250.00	
		3,006.69
Total		$42,755.28
Deduct:		
5. Interest on additional income tax, 1931	$104.95	
6. Accrual of capital stock tax	120.00	
		224.95
Net income as adjusted		$42,530.33

Explanation of Changes

1. A reasonable addition to the reserve for bad debts has been computed in accordance with articles 191 and 195, Regulations 77.

The computation follows:

Year	Opening Balance of Accounts Receivable	Bad Debts Charged Off
1927	$27,984.19	$1,240.36
1928	30,716.98	761.79
1929	27,185.54	1,954.32
1930	38,607.02	9,454.27
1931	41,750.48	4,678.61
1932	66,930.22	11,312.58
1933	63,594.99	5,283.19
Totals	$296,769.42	$34,685.14

[fol. 29] Percentage of bad debts charged off to accounts receivable, as shown above ($34,685.14 ÷ $296,769.42) 11.68%

Accounts receivable as at December 31, 1933 ... $88,581.81

Adjusted reserve for bad debts as at December 31, 1933 ($88,581.81 × 11.68%) $10,346.36

Adjusted reserve as at January 1, 1933 ..... $8,018.69

Bad debts charged off during year 6,225.30

Balance of opening reserve $1,793.39

Addition to reserve for bad debts allowed ($10,346.36 — $1,793.39) $8,552.97

Addition claimed on return 10,346.36

Excessive addition to reserve disallowed $1,793.39

2. Depreciation allowable on furniture and fixtures has been computed in accordance with Treasury Decision 4422, published on page 58, Cumulative Bulletin XIII-1. The corrected computation follows:

	Year Acquired	Cost	Reserve 12/31/32	Balance	Remaining Estimated Life
(1)	1927	$635.94	$381.54	$254.40	4 years
(2)	1932	137.50	6.88	130.62	9½ years
(3)	1933	437.50	.....	.....	10 years
	Totals	$1,210.94	$388.42	$385.02	

[fol. 30]

	Depreciation Allowed for 1933	Depreciation Reserve as at 12/31/33
(1) Continued	$63.60	$445.14
(2) Continued	13.75	20.63
(3) Continued	21.87	21.87
Totals	$99.22	$487.64
Depreciation claimed	120.41	
Excessive depreciation	$21.19	

3. Bad debts previously charged off and recovered during the taxable year have been included in adjusted net income. This adjustment has been made under the provisions of article 191, Regulations 77.

4. Capital stock tax paid on the basis of the capital stock tax return form 707 filed with the collector of internal revenue for your district on September 28, 1933, has been disallowed as a deduction in the computation of net income. Information at hand indicates that the first capital stock tax return for the fiscal year ended June 30, 1933, was filed with the collector for your district in August 1933 and that the declared value of capital stock reported thereon is $120,000.00. The capital stock tax computed and paid on this valuation and allowed as a deduction on your income tax return is $120.00.

Section 215(f) of the National Industrial Recovery Act, approved June 16, 1933, provides that the adjusted declared value shall be the value, as declared by the corporation in its first return filed under this section, which declaration of value cannot be amended. The capital stock tax ($240.00) paid on the second capital tax return (filed September 26, 1933) has therefore been restored to income. This adjust-
[fol. 31] ment has been made under the provisions of Article 151, Regulations 77.

5. Interest on a deficiency in income tax assessed for 1931 but paid during the taxable year has been allowed as a deduction from gross income. This adjustment has been made under the provisions of Article 141, Regulations 77.

6. Capital stock tax accrued as at July 1, 1933, on the basis of the capital stock value declared in capital stock tax return filed in August, 1933, has been allowed as a proper deduction in accordance with Office Decision (I. T.) 2827 published on page 130, Cumulative Bulletin XIII-2.

Computation of Tax

Income Tax

Net income as adjusted	$42,530.33
Income tax at 13¾%	$5,847.92
Income tax assessed, original, account #400982	5,465.43
Deficiency	$382.49

Excess-Profits Tax

Net income as adjusted	$42,530.33
Less: 12½% of declared value of capital stock ($120,000.00)	15,000.00
Amount subject to excess-profits tax	$27,530.33
Excess-profits tax at 5%	$1,376.52
Excess-profits tax previously assessed, account #400982	None
Deficiency	$1,376.52

[fol. 32] The records of this office indicate that no reply has been received to letter dated November 12, 1936, advising you of the approval of the report submitted by the Internal Revenue Agent in Charge at Dallas, Texas.

A copy of this letter has been mailed to your representative, Mr. J. C. Harris, 1713 Republic Bank Building, Dallas, Texas, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

JCC/DM-1.

(Here follow 6 photolithographs, side folios 33-38.)

EXHIBIT D

264-800

ORIGINAL

1933 RETURN
OF
CAPITAL STOCK TAX
For Year Ending June 30, 1933

DOMESTIC CORPORATIONS

(Sec. 215, National Industrial Recovery Act, 73d Congress, Public, No. 67)

This return must be filed with the Collector of Internal Revenue for your district on or before July 31, 1933, and the tax must be paid on or before that date.

INT. REV. DIST. TEX. AUG 22 1933

(Collector's district) Assessment List, Form 954

(Month) (Year)

41503

(Page) (Line)

Examined by

1. Name Haggar Company
(Exact name of corporation, joint-stock company, or association)

2. Address 7th Floor Fourth Unit Santa Fe Bldg., Dallas, Texas
(The address must be that of the principal place of business. Give "Street and number", "City or town", and "State".)

3. Name of parent company, if any None (District filed)

4. Name of subsidiary, if any None No. shares held (District filed)
(Give names and addresses of all subsidiaries in which the corporation owns stock; also number of shares held; also districts where filed)

5. Nature of business in detail Manufacturers Mens' and Boys' Trousers

6. Incorporated or organized in State of TEXAS Month MAY Year 1927

SEE INSTRUCTIONS ON REVERSE SIDE

7. Date or close of the last income-tax taxable year ending on or prior to the year ended June 30, 1933* January 1, 1933
*If no income-tax taxable year ending on or prior to year ended June 30, 1933, use date of organization.

8. Capital assigned as shown on balance sheet as of the date set forth in item 7 (no other date should be used):

	Number of shares	Par value per share	Total
(a) Common stock 1500 Shares - 1200 Issued	1200	$100	$120,000.00
(b) Full preferred stock			
(c) Limited preferred stock			
(d) Surplus (or deficit)			
(e) Undivided profits			
(f) Total			

COMPUTATION OF TAX

9. Original declared value for entire capital stock as of the date shown in item 7	$ 120,000.00
10. Tax at rate of $1 for each full $1,000 in item 9 (omit cents)	$1.0.00
11. Penalty of 25 percent for delinquency in filing return	
12. Interest	
13. Total tax, penalty and interest	$1.0.00

DALLAS AUG 23 1933 COLLECTOR

U.S. 101

STATE OF TEXAS
COUNTY OF DALLAS

We, J. M. Haggar, President, and M. Haggar, Secretary and Treasurer, of the corporation for which this return for capital stock tax imposed by section 215 of the National Industrial Recovery Act is made, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report, including any statements attached to or accompanying this return, are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct.

Sworn to and subscribed before me this 19th day of August, 1933

R. H. Carr
Notary Public Dallas Co. Tex
(Official capacity)

J. M. Haggar
President.
M. Haggar
Secretary

[seal]

13-1

33

EXHIBIT "C"

264800

TREASURY DEPARTMENT
Internal Revenue Service

COL. IN.
2nd Dist. ...
St. 2nd

CLOSED

1933 RETURN OF CAPITAL STOCK TAX

For Year Ending June 30, 1933

DOMESTIC CORPORATIONS

(See U.S. National Industrial Recovery Act, 73d Congress, Public No. 67)

This return must be filed with the Collector of Internal Revenue for your district on or before July 31, 1933, and the tax must be paid on or before that date.

150 00

ORIGINAL

SEE NO.

Form 41295

Examined by

1. The Hagger Company, Inc.
(Print name of corporation, joint stock company, or association)

2. Address 4th Unit 7th Floor, Santa Fe Building, Dallas, Texas
(The address must be that of the principal office of business. Give street and number, city or town, and State.)

3. Name of parent company, if any (District filed)

4. Name of subsidiary, if any (If affiliated, give name and number of district where filed) No. shares held (District filed)

5. Nature of business in detail Manufacture of Men's trousers

6. Incorporated or organized in State of Texas Month May, 1927 amended Year 1932

SEE INSTRUCTIONS ON REVERSE SIDE

7. Date of close of the last income-tax taxable year ending on or prior to the year ended June 30, 1933 December 31, 1932
* If no income-tax taxable year ending on or prior to year ended June 30, 1933, use date of organization.

8. Capital amount as shown on balance sheet as of the date set forth in item 7 (no other date should be used)

	Number of shares	Par value per share	Total
(a) Common stock	1200	$100.00	$120,000.00
(b) First preferred stock			
(c) Second preferred stock			
(d) Surplus (or deficit)			
(e) Undivided profits			
(f) Total			

COMPUTATION OF TAX

9. Original declared value for entire capital stock as of the date shown in item 7 $ 250,000.00

10. Tax at rate of $1 for each full $1,000 in item 9 (omit cents) 250.00

11. Penalty of 25 percent for delinquency in filing return -

12. Interest -

13. Total tax, penalty and interest 250.00

STATE OF Texas
COUNTY OF Dallas } ss:

We, W. M. Hagger, President, and R. M. Hagger, Sec'y of the corporation for which this return for capital stock tax imposed by section 215 of the National Industrial Recovery Act is made, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report, including any statements attached to or accompanying this return, are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct.

Sworn to and subscribed before me this 21st day of June 1933

R. M. Carr
Notary Public Dallas Co. Tex.
(Official signature)

W. M. Hagger
President

R. M. Hagger
Sec'y

SEAL

2-1

EXHIBIT "D"

Corporation Proved

Form 1120
TREASURY DEPARTMENT
Internal Revenue Service

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN
For Calendar Year 1933

Page 1 of Return

File No. 157

Serial No. 400982

This Return with the Collector of Internal Revenue for Your District on or Before March 15, 1934

PRINCIPAL(LY) CORPORATION'S NAME AND BUSINESS ADDRESS

Mercer Company, Inc.

4th Nat'l. 7th Floor, Santa Fe Building

(Street and number)

Dallas, Texas

(Post office and State)

If So Extended, Except Where Otherwise Provided in the Instructions, That This Form Is Completely Filled In Irrespective of Any Statements, Schedules, or Reports Submitted Herewith

Date of Incorporation May 1927 ; Amended January 1, 32

Under the Laws of What State or Country Texas

The Corporation's Books are in Care of Office as above Located at Dallas Texas

Fiscal Year Ended December 31, 1933 ; Is This a Consolidated Return? No ; If Yes, How Many Corporations?

If a Foreign Corporation, State Whether Resident or Nonresident ; If Nonresident, State Amount of Income Included in Item 12, Page 2, Below

Note and explain fully.

GROSS INCOME

1. Gross Sales (Where inventories are an income-determining factor), $	Less Returns and Allowances, $	Net Sales	$ 915,348.27
2. Less Cost of Goods Sold			
(a) Inventory at beginning of year		$ 77,[illegible]	
(b) Material or merchandise bought for manufacture or sale		[illegible]	
(c) Miscellaneous costs (From Schedule A, Column 1) (1) Salaries and wages, $ (2) Other costs, $		Total [illegible]	
(d) Total of Items (a), (b), and (c)		$ 902,175.21	
(e) Less, inventory at end of year		[illegible] 30	822,754.98
Gross Profit from Sales (Item 1 minus Item 2)			$ 92,284.36
Gross Receipts (Where inventories are not an income-determining factor) $			
Less cost of operations (From Schedule A, Column 2) (a) Salaries and wages, $ (b) Other costs, $		Total	
Gross Profit where inventories are not an income-determining factor (Item 4 minus Item 5)			
6. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc. & Discounts [illegible]			8,004.93
7. Rents			
8. (a) Profit from Sale of Stocks and Bonds held 2 years or less. (From Schedule B, Total (a))			
(b) Profit or Loss from Sale of all other Assets. (From Schedule B, Total (b))			
9. Dividends on Stock of (a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1932			
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1932			
(c) Foreign Corporations			
10. Other Income (State nature of income) (Use separate schedule, if necessary)	Collection of accounts previously charged off		252.85
11. Total Income in Items 3, and 6 to 10, inclusive			$ 102,192.14

DEDUCTIONS

Gross Receipts (where inventories are not an income-determining factor) ..... $

Less cost of operations (From Schedule A, Column B)
(a) Salaries and wages, $ ..... (b) Other costs, $ ..... Total .....

Gross Profit where inventories are not an income-determining factor (Item 4 minus Item 5) .....

Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc. & Discounts 8 004 93

Rents .....

(a) Profit from Sale of Stocks and Bonds held 2 years or less. (From Schedule D, Total (c)) .....

(b) Profit or Loss from Sale of all other Assets. (From Schedule D, Total (b)) .....

Dividends on Stock of
(a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1932 .....
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1932 .....
(c) Foreign Corporations .....

Other Income (State nature of income) (Use separate schedule, if necessary) Collector of accounts previously charged off 252 85

TOTAL INCOME IN ITEMS 3, AND 6 TO 12, INCLUSIVE ..... $ 102 192 44

DEDUCTIONS

Compensation of Officers (From Schedule C) ..... $ 14 150 00

Rent on Business Property 3 250 00

Repairs (From Schedule D) (a) Salaries and Wages, $ ..... (b) Other Costs, $ ..... Total .....

Interest 6 694 14

Taxes (From Schedule E) .....

Losses by Fire, Storm, etc. (From Schedule F) .....

Bad Debts (From Schedule G) Bad Debts Schedule of computation attached 10 346 71

Dividends (From Schedule H) .....

Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I) 120 11

Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit schedule, see Instruction 15) .....

Other Deductions Authorized by Law (Explain below, or on separate sheet)

(a) Salaries and wages. (Not included in Items 2, 4, 14, or 15 above) 17 904 92

(b) Administrative Expenses - schedule attached 11 577 87

24. TOTAL DEDUCTIONS IN ITEMS 14 TO 24 .....

25. NET INCOME (Item 13 minus Item 25) .....

COMPUTATION OF TAX

INCOME TAX

EXCESS-PROFITS TAX

Net Income (Item 26, above) ..... $ 30 710 00

Credit for Dividends received (15% of Item 27) (or 10%, if Item 27, if less) ..... $ 5 146 53

Credit for Tax Paid at Source on Interest received which was included in gross income .....

Credit for Tax Paid at Source on Dividends received which was included in gross income .....

Balance of Income Tax (Item 30 minus Item 31) .....

Net Income for Excess-Profits Tax Computation (Item 26, above) ..... $ 30 710 00

Less: Credit of $ 370 000 00 (Amount of capital stock or other capital as specified in Section 740 of Revenue Act of 1932) .....

Balance of Income for Excess-Profits Tax (Item 34 minus Item 35) .....

Excess-Profits Tax (15% of Item 36) .....

An amended return must be marked "Amended" ..... Checks and drafts will be accepted only if payable at par.

a-b

35

SCHEDULE K—BALANCE SHEETS (See Instruction 46)

Items	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
ASSETS				
1. Cash		102 00		100 00
2. Notes receivable		400 00		400 00
3. Accounts receivable	63 502 00		1 2 917 23	
Less reserve for bad debts	2 00 00	60 502 00	12 000 00	170 350 30
4. Inventories:				
Raw materials				
Work in process	37 193 75		600 020 30	
Finished goods				
Supplies				
		37		81 020 30
5. Investments (nontaxable):				
Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia				
Securities issued under the Federal Farm Loan Act or under such Act as amended and obligations of United States possessions				
Obligations of the United States				
6. Other investments:				
Stocks of domestic corporations				
Bonds of domestic corporations				
Stocks and bonds of foreign corporations				
All other investments or loans				
7. Deferred charges:				
Prepaid insurance				
Prepaid taxes				
All other				
8. Capital assets:				
Land				
Buildings				
Machinery and equipment			1 27 00	
Furniture and fixtures				
Delivery equipment				
Less reserves for depreciation (except on land)				22 11
9. Patents				50 00
10. Good will				
11. Other assets (describe fully):				
		71		
12. Total Assets				251 372 71
LIABILITIES				
13. Notes payable (less than one year)				42 000 00
14. Accounts payable				1 213 65

| | | |

SCHEDULE L—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS

1. Net income from Page 1, page 1 of the return			$	37	703	59
2. Nontaxable income						
(a) Interest on obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia						
(b) Interest on securities issued under the Federal Farm Loan Act, or under such Act as amended						
(c) Interest on obligations of the United States or its possessions						
(d) Dividends deductible under Section 23 (p) of the Revenue Act of 1932						
(e) Proceeds of life insurance policies paid upon the death of the insured						
(f) Other items of nontaxable income (to be detailed)						
(1) [illegible]						
(2) [illegible]						
(3) [illegible]						
3. Charges against reserve for bad debts, if Item 10, page 1 of return, is not an addition to a reserve						
4. Charges against reserves for contingencies, etc. (to be detailed)						
(a)						
(b)						
(c)						
5. Total of Lines 1 to 4, inclusive			$	40	243	57
6. Total from Line 16				3	180	07
7. Net profit for year, as shown by books, before any adjustments [illegible] (Line 5 minus Line 6)			$	37	063	50
8. [illegible] and undivided profits as shown by balance sheet at close of preceding taxable year					701	27
9. Other credits to surplus (to be detailed):						
(a) [illegible]						
(b) [illegible]						
(c) [illegible]					120	2
10. Total of Lines 7 to 9, inclusive			$	37	326	39
11. Total from Line 17				24	702	96
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)			$	13	623	43

13. Unallowable deductions						
(a) Donations, gratuities, and contributions			$			
(b) Income and profits taxes paid to the United States, and such taxes paid to its possessions or foreign countries if claimed as a credit in Item 20, page 1 of the return						
(c) Federal taxes paid on tax-free covenant bonds						
(d) Special improvement taxes tending to increase the value of the property assessed						
(e) Premiums and interest, additions, or betterments treated as expenses on the books						
(f) Replacements and renewals						
(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary						
(h) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation						
(i) Additions to reserve for bad debts which are not included in Item 10, page 1 of return						
(j) Additions to reserves for contingencies, etc. (to be detailed)						
(1)						
(2)						
(3)						
(k) Other unallowable deductions (to be detailed)						
(1) Federal income taxes				3	180	07
(2)						
(3)						
14. Total of Line 13			$	3	180	07
15. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation, or other property)						
(a) Date paid Dec. 31	Character Cash		$	21	000	00
(b) Date paid	Character					
(c) Date paid	Character					
(d) Date paid	Character					
16. Other debits to surplus (to be detailed)						
(a) Adjustment of income for bad debts					522	89
(b) [illegible]					519	69
(c) Adjustment of depreciation					183	57
17. Total of Lines 15 and 16			$	24	702	96

NET INCOME OR DEFICIT REPORTED IN RETURN FOR 1932 BEFORE DEDUCTING NET LOSS FOR PRIOR YEAR

1. Enter amount of net income or deficit for 1932 before deducting net loss for 1931 ..... $ .....

Enter amount deducted in return for 1932 as net loss $ ..... $ .....

KIND OF BUSINESS

2. State the main business engaged in, also whether acting as principal or as agent on commission; state if inactive or in liquidation.

Principal - Sale of [illegible]

AFFILIATIONS WITH OTHER CORPORATIONS

SEE INSTRUCTION 40

4. Is this a consolidated return? ..... No ..... If so, procure from the Collector of Internal Revenue (or your district Form 851, Affiliations Schedule, which shall be filed in, sworn to, and filed as a part of this return. See Section 141 of the Revenue Act of 1932 and Instruction 41.

5. Was the income of this corporation included in a consolidated return for the prior year? ..... No .....

If so, give name of corporation which filed the consolidated return. .....

6. Total from Line 14			3	[illegible]	07		
7. Net profit for year, as shown by books, before any adjustments made thereon (Line 5 minus Line 6)		27	083	60			
8. [illegible] and undivided profits as shown by balance sheet at close of preceding taxable year			701	27			
9. Other credits to surplus (to be detailed): (a) [illegible]							
(b) [illegible]							
(c)			130	79			
10. Total of Lines 7 to 9, inclusive		27	936	39			
11. Total from Line 17		24	702	86			
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)		13	[illegible]	13			

(7)							
14. Total for Line 13						3	180 07
15. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation, or other property) (a) Date paid Dec. 31 Character Cash						2	000 00
(b) Date paid Character							
(c) Date paid Character							
(d) Date paid Character							
16. Other debits to surplus (to be detailed) (a) Adjustment of [illegible] for bad [illegible]							
(b) By collections [illegible] not [illegible]						698	69
(c) Adjustment of [illegible]						183	57
17. Total of Lines 14 and 16						24	702 86

NET INCOME OR DEFICIT REPORTED IN RETURN FOR 1932 BEFORE DEDUCTING NET LOSS FOR PRIOR YEAR

1. Enter amount of net income or deficit for 1932 before deducting net loss for 1931 ..... $ .....

Enter amount deducted in return for 1932 as net loss ..... $ .....

KIND OF BUSINESS

2. State the main business engaged in, also whether acting as principal or as agent or commission; state if inactive or in liquidation.

Principal - Sale of [illegible] Cards

Check the proper block below to indicate the general industrial division in which the corporation's main income-producing business falls:

- ☐ Agriculture and related industries, including fishing, forestry, ice harvesting, etc.; also leasing of such property.
- ☐ Mining and quarrying, including gas and oil wells; also leasing of such property.
- Manufacturing—
  - ☐ Food products and beverages.
  - ☐ Tobacco.
  - ☒ Textiles and textile products.
  - ☐ Leather and leather products.
  - ☐ Rubber and related products.
  - ☐ Lumber and wood products, including fiber furniture.
  - ☒ Paper, pulp and products.
  - ☐ Printing, publishing, and allied businesses.
  - ☐ Chemicals and allied products, including petroleum products.
  - ☐ Stone, clay, and glass products.
  - ☐ Metal and metal products, including precious metals and products.
  - ☐ Other manufacturing.
- ☐ Construction—excavations, buildings, bridges, railroads, ships, etc.; also equipping and installing operating systems, devices, or machinery without their manufacture.
- ☐ Transportation—rail, water, aerial, motor, etc.; also leasing of such facilities.
- ☐ Public utilities—electric light or power, gas (artificial or natural), pipe lines, telephone, telegraph or radio, waterworks, heating, toll bridges, etc.; also leasing of such utilities.
- ☐ Storage—cold storage, grain elevators, warehouses, safe deposit vaults, etc.; also leasing of such property.
- ☐ Trading—wholesale, retail, or commission.
- ☐ Service—professional, business, amusement, and domestic, including hotels, restaurants, laundries, etc.
- ☐ Finance—banks and other financial organizations, insurance, real estate; also brokers and agents.

AFFILIATIONS WITH OTHER CORPORATIONS
SEE INSTRUCTION 4B

4. Is this a consolidated return? ..... If so, procure from the Collector of Internal Revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return. See Section 141 of the Revenue Act of 1932 and Instruction 41.

5. Was the income of this corporation included in a consolidated return for the prior year? No

If so, give name of corporation which filed the consolidated return. .....

PREDECESSOR BUSINESS

6. Did the corporation file a return under the same name for the preceding taxable year? Yes Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? No If answer is "yes," give name and address of each predecessor business, and the date of the change in entity .....

Upon such change were any asset values increased or decreased? .....
If the answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished.

BASIS OF RETURN

7. Is this return made on the basis of cash receipts and disbursements? Yes
If not, describe fully what other basis or method was used in computing net income .....

VALUATION OF INVENTORIES

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock .....

Cost or Market

LIST OF ATTACHED SCHEDULES

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return.

Administrative Expense - Schedule 1
Computation of Bad Debts Reserve - Schedule 2

A-3

Page 4 of Return

SCHEDULE A (See Instructions 2 and 5)

1. COST OF SALES (WHERE INVENTORIES ARE AN INCOME-DETERMINING FACTOR)

Items	Amount (Enter on Item 3 (a))
Salaries and wages [illegible] on Sales	$ [illegible] 21
Other costs	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

2. COST OF OPERATIONS (WHERE INVENTORIES ARE NOT AN INCOME-DETERMINING FACTOR)

Items	Amount (Enter on Item 6)
Salaries and wages	
Other costs	

SCHEDULE B PROFIT FROM SALE OF STOCKS, BONDS, REAL ESTATE, ETC. (See Instruction 10)

1. Kind of Property	2. Date Purchased	3. Date Sold	4. Amount Received	5. Cost	6. March 1, 1913 Value (If Any) Had Such Been Their Basis	7. Cost of Improvements Made After March 1, 1913	8. Depreciation Allowed and Allowable (Other Than Amount Allowed Under Section 202 (b) of 1924 Act) From March 1, 1913	9. Net Profit or Loss
a) Stocks and bonds held 2 years or less								
Total (Transfer net profit to Item 10 (a))								
b) All other assets (§								

(a) Net transfer net profit or loss to Item

* As defined in Section 23 (r) 1932 Act. State how property was acquired

SCHEDULE C COMPENSATION OF OFFICERS (See Instruction 14)

1. Name of Officer	2. Official Title	3. Time Devoted to Business	4. Percentage of Stock Owned	5. Amount of Compensation (Enter on Item 12)
J. M. Hagger	President	Full	911	$14,1[illegible]

SCHEDULE D. COST OF REPAIRS (See Instruction 16)

Items	Amount (Enter on Item 16)
[illegible]	
[illegible]	
[illegible]	
[illegible]	

SCHEDULE E. TAXES PAID (See Instruction 18)

Items	Amount (Enter on Item 20)
[illegible]	$ [illegible] 94
[illegible]	272 20
[illegible]	499 67
[illegible]	33 60
[illegible]	121 93

SCHEDULE F EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 19)

1. Kind of Property	2. Date Acquired	3. Cost or Value March 1, 1913 (If Acquired Prior Thereto)	4. Subsequent Improvements	5. Depreciation Allowed or Allowable Since March 1, 1913	6. Insurance and Salvage Value	7. Deductible Loss (Enter on Item 21)
						$ [illegible] 14

Total ... transferred and ... to Item 10 ...

... transferred out ... Item 9 ...

... Section 23(r) 1932 Act ...
State how property was acquired ...

SCHEDULE C COMPENSATION OF OFFICERS (See Instruction 14)

1 Name of Officer	2 Official Title	3 No. Devoted to Business	4 Shares of Stock Owned: Common	4 Shares of Stock Owned: Preferred	5 Amount of Compensation (Enter on Item 9)
J. H. Bagger	President	Full	911		$4,150.00

SCHEDULE D COST OF REPAIRS (See Instruction 16)

1 Items	2 Amount (Enter on Item 10)

SCHEDULE E TAXES PAID (See Instruction 18)

1 Items	2 Amount (Enter on Item 12)
Pe ...	$ 1,400.94
...	372.00
...	499.67
...	33.60
...	93
	$2,294.14

SCHEDULE F EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 19)

1 Kind of Property	2 Date Acquired	3 Cost or Value as of March 1, 1913 (Whichever Applies)	4 Subsequent Improvements	5 Depreciation Allowable Since March 1, 1913 (If Any)	6 Insurance and Salvage Value	7 Deductible Loss (Enter on Item 19)
		$				

Date how property was acquired ...

SCHEDULE G BAD DEBTS (See Instruction 20)

1 Year	2 Bad Debts
1929	
1930	
1931	
1932	
1933	

SCHEDULE H DIVIDENDS DEDUCTIBLE (See Instruction 21)

1 Name of Corporation	Amount of Dividends: 2 Preferred	3 Common

SCHEDULE I EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 22)

1 Kind of Property	2 Date Acquired	3 Age When Acquired	4 Remaining Life After Acquisition	5 Cost	6 March 1, 1913 Value if Acquired Prior to That Date	7 Depreciation Allowed (or Allowable) in Prior Years	8 Depreciation Allowable This Year
...						$ 57	120

AFFIDAVIT

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by us and is, to the best of his knowledge and belief, a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1932 and the National Industrial Recovery Act and the Regulations issued thereunder.

Sworn to and subscribed before me this 22 day of March, 1934

IMPERIAL SEAL

R. N. Tarr Notary Public Bessie Carter

(Signature of officer administering oath) (Title)

CORPORATE SEAL

J. H. Bagger

Harry Nogal

(Signature of Treasurer) (Treasurer)

See Instruction 23. Attach a separate sheet if any of the above schedules do not provide sufficient space.

[fol. 39] PARAGRAPH #3 OF EXHIBIT "E"

3. Original declared value.—The corporation is required by the act to declare a value for its entire capital stock as of the date of the last income-tax taxable year ending on or prior to June 30, 1933, or as of the date of organization in the case of a corporation having no income-tax taxable year ending on or prior to June 30, 1933. Such original declared value is not subject to any amendment either by the Commissioner or by the corporation. However, if the net income for the income-tax taxable year immediately following the date shown in item 7, on the reverse side, is in excess of 12½ per cent of such declared value, an excess-profits tax of 5 per cent is imposed by section 216 of the act on the portion of the income that is in excess of 12½ per cent.

In arriving at the original declared value, the value of the corporation's business and property as an entirety and as a going concern should be considered, and in doing so, it should look to the net worth of the corporate assets, including its surplus and undivided profits as shown by the books, also to the franchise, good will, outstanding contracts, the earning capacity of the corporation, and the market value of its shares of stock. After having done so, the corporation should then determine the original declared value for its entire capital stock according to its best judgment.

[fol. 40] EXHIBIT "F"

Copy.

Nov. 4, 1936.

MT:CST:CCG.
122849.

Haggar Company,
4th Unit Santa Fe Building,
Dallas, Texas.

GENTLEMEN:

Reference is made to your capital stock tax return filed August 22, 1933, for the taxable year ended June 30, 1933, on which you declared a value for your entire capital stock of $120,000.00 and paid tax in the amount of $120.00.

Reference is also made to another return filed September 28, 1933, by The Haggar Company, Inc., on which a valua-

tion of $250,000.00 was reported and tax paid in the amount of $250.00. This office accepted the second return on the assumption that there were two corporations. However, from information submitted by a revenue agent, it appears that there is only one corporation and that the correct name is Haggar Company. That fact is further borne out by the corporate seal on both returns showing the name "Haggar Company."

It is apparent, therefore, that the return filed September 28, 1933, was made in an attempt to amend the original declared value as reported on your return filed August 22, 1933, and you are advised that the amendment of the original declared value is specifically prohibited by section 215 of the National Industrial Recovery Act.

You are at liberty to file claim for refund with the collector of the excess tax paid.

Form 843 is inclosed for your convenience.

Respectfully,

(Signed) D. S. Bliss, Deputy Commissioner.

[fol. 41] BEFORE UNITED STATES BOARD OF TAX APPEALS

PRAECIPE FOR RECORD—Filed Nov. 9, 1938

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify, and transmit to the Clerk of the Circuit Court of Appeals of the United States for the Fifth Circuit at New Orleans, Louisiana, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record of the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents, or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

(3) The opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review filed by the petitioner in the above cause.

[fol. 42] (6) The stipulation of facts executed by the Attorney for petitioner and Chief Counsel for the Bureau of Internal Revenue, with Exhibits A, B, C, D and F attached thereto. And Paragraph 3 only from Exhibit E.

(7) This praecipe.

O. D. Brundidge, Attorney for Petitioner, 2003 Republic Bank Bldg., Dallas, Texas.

Personal service of the foregoing Praecipe for Record and the receipt of a copy thereof is hereby acknowledged this 9th day of November, A. D. 1938.

J. P. Wenchel, W., Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

[fol. 43] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 44] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of April 19th, 1939

No. 9009

HAGGAR COMPANY,

versus

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by O. D. Brundidge, Esq., for petitioner, and Miss Helen R. Carloss, Special Assistant to the Attorney General, for respondent, was submitted to the Court.

[fol. 45] OPINION OF THE COURT—Filed May 23, 1939

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9009

HAGGAR COMPANY, Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition for Review of Decision of United States Board of Tax Appeals (District of Texas)

(May 23, 1939)

Before Sibley, Hutcheson and Holmes, Circuit Judges

HOLMES, Circuit Judge:

This appeal is from a decision of the Board of Tax Appeals sustaining a deficiency assessment against petitioner for excess-profits taxes for the year 1933. The question presented is whether a capital-stock tax return, filed pursuant to section 215 (f) of the National Industrial Recovery Act, may be amended within the time fixed for filing returns.

[fol. 46] Section 215 (a) of the act imposes a tax of $1 for each $1,000 of the adjusted declared value of the capital stock of each domestic corporation doing business during the year ending June 30, 1933, to be paid by the corporation. Clause (d) provides that every such corporation shall make a return within one month after June 30th, and that the commissioner, with the approval of the Secretary, may set up rules and regulations prescribing the form and content of the return, as well as for an extension of time, not to exceed sixty days, for making the return. Clause (f) provides that, for the first year, the adjusted declared value shall be the value as declared by the corporation in its first return, and further provides that such declaration of value may not be amended. By section 216 (a), an excess-profits tax is imposed, the tax being equivalent to 5 per cent of such portion of the net income for the income-tax taxable year, as exceeds 12½ per cent of the adjusted declared value. 48 Stat. 195.

Treasury regulation 64 (1933 Ed.), article 42, adopted the foregoing provisions of the act, and admonished that the declared value would not only be used as the basis for payment of the capital-stock tax for the first taxable year, but that it would also be a primary factor in the computation of the tax for later years, as well as for the computation of excess-profits taxes. Instructions were attached to the form adopted for making the return, in which it was stated that the corporation was required to declare a value for its entire capital stock, which declared value would not be subject to change either by the commissioner or the corporation, but that, if the net income for the income-tax taxable year should be in excess of the 12½ per cent of such declared value, an excess-profits tax of 5 per cent of the excess was imposed by the act. The instructions further stated that, in [fol. 47] arriving at the original declared value, the value of the business and property as an entirety and as a going concern should be considered, as well as the net worth of the corporate assets, including surplus and undivided profits, franchise, good will, outstanding contracts, earning capacity, and the market value of the corporate shares. Following this recitation, it stated that the corporation should determine the original declared value according to its best judgment.

Petitioner filed its first return, declaring therein a value of $120,000 for its entire capital stock, and paid $120 as the tax due thereon. Thereafter, and within the extended time for filing its return, it filed another and different return

declaring the value at $250,000, and paid $250 as the tax due thereon. Due to a slight difference in the corporate name given on the two returns, and to the absence of any reference in the latter to the former, the collector accepted both on the assumption that they were made for different corporations. The first return declared the value of the stock at its par or face value; the second declared it at what petitioner contends was its actual or real value. A claim for a refund of the $120 tax payment was denied, but a refund of the $250 payment was tendered to petitioner, and rejected.

On March 15, 1934, petitioner filed its income and excess-profits tax return for the calendar year 1933, in which it inadvertently computed its excess-profits tax exemption at 12½ per cent of $3[illegible]0,000. The deficiency determined by respondent is computed on the basis of a declared value of $120,000. That contended for by petitioner is $250,000. Respondent contends that the original declared value is that set out in the first return. Petitioner contends that its second return was intended as an amendment of the first and, being filed within the time allowed, should be the one considered.

[fol. 48] The plan of taxation provided for in the act is a flat rate of taxation on the capital investment, and an additional tax on excess profits derived therefrom. Thus, if the taxable value of the capital investment be relatively high, the capital-stock tax is proportionately great. However, in such case, the probability of tax liability for profits is remote. If the taxable value placed upon the capital investment be relatively low, the capital-stock tax is correspondingly low, but the probability of the profits being taxable becomes large. The two taxes are made to work against each other, and the Government accepts the revenue from either source as being just. The declaration of a high value for the capital investment exposes the corporation to a tax liability when no profits are realized, while a low declaration of value produces a high potential liability if profits are realized. The basis of excess-profits taxes being an exemption of 12½ per cent of the declared value, the taxpayer is given a formula by which, to avoid both extremes and inequitable results, it may apply the information best known to it.

In the report of the Senate Finance Committee, Senator Harrison, Chairman, states that, in order "to avoid controversy as to the value of the capital stock, the tax is imposed upon the value declared by the corporation." In the same report it is stated that the primary object of the excess-

profits tax is to induce corporations to declare a fair value for their corporate stock. Senate Report No. 114, 73 Congress, 1st Session, page 6.

If the language of section 215 (f) is to be taken literally, there can be no doubt of the correctness of the interpretation placed thereon by respondent and the Board of Tax Appeals. That language is, "the adjusted declared value shall be the value, as declared by the corporation in its first return under this section." This language is immediately fol- [fol. 49] lowed by the parenthetical provision, "which declaration of value cannot be amended." This language is clear and free from any ambiguity or shades of meaning which would call for the application of any rules of construction other than that it shall be given its plain meaning. If Congress had intended to allow an amendment to the declaration of value within the time for filing returns, it could have done so, and would not have specified the declaration in the first return as the basis for the computation of the tax. United States v. Hartwell, 6 Wall. 385, 396, 18 L. Ed. 830; Lake County v. Rollins, 130 U. S. 662, 670, 9 Sup. Ct. 651, 32 L. Ed. 1060; Hamilton v. Rathbone, 175 U. S. 414, 419, 20 Sup. Ct. 155, 44 L. Ed. 219; Thompson v. United States, 246 U. S. 547, 551, 38 Sup. Ct. 349, 62 L. Ed. 876; United States v. Shreveport Grain and Elevator Co., 287 U. S. 77, 53 Sup. Ct. 42, 77 L. Ed. 175.

The administrative interpretation of this and subsequent provisions in later revenue acts, incorporated in the Treasury regulations, followed by subsequent enactments in which the same language is used, leaves no doubt as to legislative intent. The declared legislative purpose being to make the first return filed under the act the basis for the computation of the tax, and recognizing the possibility that amended returns might be attempted, the Congress expressly provided that the first declaration of value was not subject to amendment. The purpose to relieve the commissioner of any duty to determine the correct valuation, and requiring the corporation to fix its own value, would be defeated by any other view, since the filing of a succession of returns, with nothing more, would require a determination of [fol. 50] which was correct. Moreover, any question as to which return correctly declared the value would give rise to litigation of the very type that the Congress sought to prevent.

We are not unmindful of a contrary holding by the Sixth Circuit in the case of Glenn v. Ortel Co., 97 F. (2) 495. In

that case the opinion seems to take the view that the Congress was seeking to have the return declare the true or actual value of the capital assets of the corporation. Value is a relative term, and, when applied to the capital assets of a corporation defies application of any set rule or formula for its determination. Since the assets include good will, franchises, value as a going concern, as well as physical properties with fluctuating values, a method of determination for one corporation may be unjust for another; and the value, once determined, is subject to change between the time of its determination and the filing date of the return. Thus, true or actual value is made irrelevant, and the corporation is given the privilege of making its own rules and applying its own formulas, not for the determination of actual or real value, but for a basis upon which both taxes are to be computed, and with the privilege of selecting the basis most favorable to it. To make the plan work, it is necessary to confine the determination of tax liability to one return, and only one. The selection of the first, an intermediate, or the last return is a matter within the legislative discretion. In the act under consideration, the first return was selected.

The Board of Tax Appeals having held that the declara-
[fol. 51] tion contained in the first return was the true basis for the computation of the tax, and that the deficiency assessed by respondent was correct, its decision is

Affirmed.

[fol. 52] JUDGMENT

Extract from the Minutes of May 23rd, 1939

No. 9009

HAGGAR COMPANY

versus

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of Haggar Company for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decision of the said United States Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

[fols. 53-54] PETITION FOR REHEARING—Filed June 12, 1939

Petition for rehearing, covering 2 pages, filed June 12, 1939, omitted from this print. It was denied, and nothing more by order of June 17, 1939.

[fol. 55] ORDER DENYING REHEARING

Extract from the Minutes of June 17th, 1939

No. 9009

HAGGAR COMPANY

versus

COMMISSIONER OF INTERNAL REVENUE

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 56] MOTION AND ORDER STAYING MANDATE—Filed June 24, 1939

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AT NEW ORLEANS

No. 9009

HAGGAR COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition for Review of Decision of the United States Board of Tax Appeals (District of Texas)

Motion to Stay Issuance of Mandate

To the Honorable Circuit Court of Appeals:

Haggar Company, petitioner, appellant in the above entitled cause, shows to the court that it desires to petition the Supreme Court of the United States for a writ of certiorari to review the final judgment of this Honorable Court, and to that end desires a stay of the mandate from this court pursuant to the provisions of 28 USCA 350.

Movant shows that the judgment in this case bears interest at the rate of six per cent per annum, and that it has a supersedeas bond fully and amply protecting the

appellee, and that no harm could come to it by the staying of the mandate.

Wherefore, Haggar Company respectfully prays that the mandate of this court be stayed for a reasonable length of time to permit it to petition for and obtain a writ of certior-
[fol. 57] ari to the Supreme Court of the United States.

Dated June 21, 1939.

O. D. Brundidge, Attorney for Movant. Chrestman, Brundidge, Fountain, Elliott & Bateman, of Counsel, 2003 Republic Bank Building, Dallas Texas.

[fol. 58] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 9009

HAGGAR COMPANY, Petitioner

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Consideration of the Application of the Petitioner in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Petitioner to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 24th day of June, 1939.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 59] CLERK'S CERTIFICATE

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

UNITED STATES OF AMERICA:

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 44 to 58 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 9009, wherein Haggar Company is petitioner, and Commissioner of Internal Revenue is respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 43 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of June, A. D. 1939.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 60] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

Endorsed on cover: File No. 43,583. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 176. Haggar Company, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed July 5, 1939. Term No. 176, O. T., 1939.

(4330)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 176

HAGGAR COMPANY,

vs. *Petitioner,*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LLOYD E. ELLIOTT,
Attorney for Petitioner.

O. D. BRUNDIDGE,
Of Counsel.

INDEX.

Subject Index.

	Page
Petition for certiorari	1
Summary statement of case	1
Reasons relied on for allowance of writ	2
Prayer	3
Brief in support of petition for writ of certiorari	5
I. Opinion of court below	5
II. Jurisdiction	5
III. Statement of case	6
IV. Specification of error	6
V. Summary of argument	7
Argument	7
Conclusion	9

Cases Cited.

Glenn v. *Oertel Co.*, 97 F. (2d) 495	2, 6, 7
Philadelphia Brewing Co. v. *United States*, 27 Fed. Supp. 583, 394 C. C. H., Par. 9528	3, 5, 6, 7, 8

Statutes Cited.

Section 240(a), Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, Title U. S. C. A., Sec. 347	6
National Industrial Recovery Act, c. 90, 48 Stat. 195	1
Sec. 215 (Appendix, p. 1)	1, 2, 6, 7, 11
Sec. 216 (Appendix, p. 2)	11
S. Rep. No. 114, 73rd Cong., 1st Sess., p. 6 and Con-	
Petition for writ of certiorari	8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 176

HAGGAR COMPANY,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petition of Haggar Company, a Texas corporation, would respectfully show to this Honorable Court:

I.

Summary Statement of the Case.

On August 22, 1933, petitioner filed its capital stock tax return pursuant to Section 215(d) and (f) of the National Industrial Recovery Act (48 Stat. 195, 208), giving as the

declared value of its capital stock, its par value of $120,000.00, petitioner assuming that the Act called for a declaration of such par value (R. 22).

On September 28, 1933, and within the extended time (Treasury Decisions Nos. 4368 and 4386) for filing capital stock tax returns for the year ending June 30, 1933, petitioner, in good faith, filed a second or amended capital stock tax return, declaring the actual value of its capital stock at $250,000.00 (R. 23).

On March 15, 1934, petitioner filed its income and excess-profits tax return for 1933, in which it inadvertently computed its excess-profits tax exemption at 12½% of $370,000.00 instead of $250,000.00 as it intended to do, and now claims should be done (R. 24).

Respondent, contending that the declared value in the return of August 22, 1933, should control, assessed a deficiency of $1376.52 excess-profits taxes against petitioner on March 3, 1937 (R. 26). An appeal to the Board of Tax Appeals (filed May 28, 1937, R. 2) being against petitioner (R. 11-15), it filed a petition for review in the United States Circuit Court of Appeals for the Fifth Circuit (R. 16-21), where the decision of the Board of Tax Appeals was affirmed on the ground that under Sec. 215(f) National Industrial Recovery Act, a capital stock tax return could not be amended within the time fixed for filing returns (R. 44-48).

II.

Reasons Relied on for Allowance of Writ.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Glenn* v. *Oertel Company*, 97 Fed. (2d) 495.

2. The decision of the Circuit Court of Appeals is in conflict with the decision of the Court of Claims in the case of *Philadelphia Brewing Co.* v. *United States*, 27 Fed. Supp. 583, 394 C. C. H. par. 9528, decided May 29, 1939.

3. The Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Honorable Court, in that there is now a recognized conflict between the Circuit Courts of Appeals on the question involved.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, commanding that court to certify and send to this court for its review and determination, on a date certain therein to be named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 9009, Haggar Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, that said judgment of said court may be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

HAGGAR COMPANY,
By LLOYD E. ELLIOTT,
Dallas, Texas.

O. D. BRUNDIDGE.
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 176

HAGGAR COMPANY,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Board of Tax Appeals (R. 11-15) is reported in 38 B. T. A. 141. The opinion of the United States Circuit Court of Appeals (R. 44-48), is reported in 104 F. (2d) 24, as Haggar Company, petitioner vs. Commissioner of Internal Revenue, respondent. 394 C. C. H. par. 9523.

II.

Jurisdiction.

The date of the judgment to be reviewed is May 23, 1939 (R. 48).

Petitioner filed a motion for rehearing in the Circuit Court of Appeals (R. 49-50), which was overruled on June 17, 1939 (R. 51). Upon written application of petitioner (R. 51-52), the Circuit Court of Appeals ordered that the issuance of mandate be stayed thirty days from June 24, 1939 (R. 52).

2. The Honorable Circuit Court of Appeals affirmed the decision of the United States Board of Tax Appeals in favor of respondent upon the ground that Sec. 215(f) of the National Industrial Recovery Act did not permit a capital stock tax return once filed to be amended, even within the time fixed for the original filing of the return.

3. The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28 U. S. C. A., Sec. 347, and Supreme Court Rule 38, Sec. 5(b).

4. Cases believed to support the jurisdiction of this court are:

Glenn v. *Oertel Co.* (C. C. A. 6), 97 F. (2d) 495;
Philadelphia Brewing Co. v. *United States* (Ct. Cl.), 27 Fed. Supp. 583, 394 C. C. H. ¶ 9528.

III.

Statement of the Case.

The case has already been stated, pages 1 and 2 in the petition, which is hereby adopted and made a part of this brief.

IV.

Specification of Error.

The Honorable Circuit Court of Appeals erred in holding that petitioner's capital stock tax return filed pursuant to

Sec. 215(f) of the National Industrial Recovery Act, on August 22, 1933, could not be, and was not, amended by the second return filed September 28, 1933, and within the extended time for filing capital stock tax return for the year ending June 30, 1933.

V.

Summary of the Argument.

The holding of the Circuit Court of Appeals that a capital stock tax return could not be amended within the time fixed for the original filing of the return is contrary to the holding of the Sixth Circuit Court of Appeals in the case of *Glenn* v. *Oertel Company*, 97 F. (2d) 495, and the holding of the Court of Claims in *Philadelphia Brewing Co.* v. *United States*, 27 Fed. Supp. 583, 394 C. C. H. ¶ 9528.

Argument.

The decisions conflict on the construction to be given that portion of Sect. 215(f) of the National Industrial Recovery Act (copied in full in Appendix) reading:

> "For the first year ending June 30 in respect of which a tax is imposed by this Section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income taxable year ending at or prior to the close of the year for which the tax is imposed by this Section."

In *Glenn* v. *Oertel Company*, 97 F. (2d) 495, the Circuit Court of Appeals for the Sixth Circuit in holding that, under the above statute, a return could be amended within the time allowed for filing the original return, said:

> "We cannot think that Congress intended an untrue return to be unamendable for no better or more sub-

stantial reason than that it was first in point of time, when the extension granted by the Commissioner had not expired when the correction was filed. Such construction logically followed permits the Government to lay a tax upon appellee's errors rather than its income. It goes further than that and destroys the 'primary object' of providing the excess profits tax in Sec. 216(a) which was to induce corporation to declare a fair and reasonable value upon their stock. See Senate Committee's Report No. 114 and the Conference Report No. 13185, p. 23. Surely no such harsh and far reaching results were intended. If they were, serious constitutional questions arise.

"We think that the correct view, which accords with the principle that 'in constructing tax laws all doubt must be decided in favor of the taxpayer' (Gould *v.* Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211), is, that the incorrect, invalid return springing from an honest mistake would not support any fair levy or assessment and that the Congress did not intend to prohibit its correction within the permitted period; that 'the taxpayer should be permitted to do what he had the right to do in the first instance' (Lucas *v.* Sterling Oil & Gas Co., 6 Cir., 62 F. 2d 951, 952); and that the corrected return of September 1 be adjudged the 'first return under this section' as distinguished from returns of subsequent years which were to be based thereon. Emphasis should be laid upon the necessity of a correct return for the first year. This neither penalizes appellee nor takes away from appellant any substantial right. It places appellee upon an equal footing with all similar taxpayers who file a single corrected return within the permissible limit."

The Court of Claims reached a like result in *Philadelphia Brewing Company* v. *United States,* decided May 29, 1939, 27 Fed. Supp. 583, 394 C. C. H. ¶ 9528.

The Circuit Court of Appeals for the Fifth Circuit, in the instant case, held just to the contrary; and in referring to the above decision in *Glenn* v. *Oertel Company*, said:

> "We are not unmindful of a contrary holding by the Sixth Circuit in the case of Glenn *v.* Oertel Company, 97 F. (2) 495. In that case the opinion seems to take the view that the Congress was seeking to have the return declare the true or actual value of the capital assets of the corporation. Value is a relative term, and, when applied to the capital assets of a corporation, defies application of any set rule or formula for its determination. Since the assets include good will, franchises, value as a going concern, as well as physical properties with fluctuating values, a method of determination for one corporation may be unjust for another; and the value, once determined, is subject to change between the time of its determination and the filing date of the return. Thus, true or actual value is made irrelevant, and the corporation is given the privilege of making its own rules and applying its own formula, not for the determination of actual or real value, but for a basis upon which both taxes are to be computed, and with the privilege of selecting the basis most favorable to it. To make the plan work, it is necessary to confine the determination of tax liability to one return, and only one. The selection of the first, an intermediate, or the last return is a matter within the legislative discretion. In the act under consideration, the first return was selected."
>
> "The Board of Tax Appeals having held that the declaration contained in the first return was the true basis for the computation of the tax, and that the deficiency assessed by respondent was correct, its decision is affirmed."

There is therefore a recognized, direct conflict on the construction of a federal statute, which has not, but should be, passed upon and settled by the Honorable Court, by

granting the writ of certiorari, and thereafter reviewing and reversing the decision of the Honorable Circuit Court of Appeals.

Respectfully submitted,

LLOYD E. ELLIOTT,
Dallas, Texas,
Attorney for Petitioner.

O. D. BRUNDIDGE,
Of Counsel.

APPENDIX.

SEC. 215(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed * * *. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

SEC. 215(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value can not be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profts, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. * * *

SEC. 216(a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 214, an excess-profits tax eqhivalent to 5 per centum of such portion of its net income

for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capita stock. * * * as of the close of the preceding income-ta taxable year (or as of the date of organization if it had n preceding income-tax taxable year) determined as pro vided in section 215. The terms used in this section shal have the same meaning as when used in the Revenue Ac of 1932.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 176

HAGGAR COMPANY,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

Respondent.

BRIEF FOR PETITIONER

Respectfully submitted,

LLOYD E. ELLIOTT,
Dallas, Texas,
Attorney for Petitioner,
Haggar Company.

O. D. BRUNDIDGE,
Dallas, Texas,
Of Counsel.

INDEX

Subject Index

	Pages
Opinions of Courts Below	1
Jurisdiction	1-2
Statement of the Case	2-3
Specification of Error	3
Summary of Argument	3-4
Argument	4-9
Appendix	10-11

Cases Cited

C. H. Meade Coal Co. vs. Commissioner 394 C.C.H. ¶ 9678 — 5

Glenn vs. Oertel Co., 13 Fed. Supp. 651, 97 F. (2) 495 — 4

Gould vs. Gould, 245 U. S. 151 — 9

Heiner vs. Donan, 285 U. S. 312, 52 S. Ct. 358 — 9

Helvering vs. New York Trust Co., 292 U.S. 455, 469, 54 S. Ct. 806-808 — 8

Morrow, Meek, et al vs. Ewing (C.C.A. 5) 57 F. (2) 1 — 8

Philadelphia Brewing Co. vs. United States 27 Fed. Supp. 583 — 5

Statutes Cited

Sect. 240(a) Judicial Code, as amended by Act February 13, 1925, 43 Stat. 938, 28 U.S.C.A. 347 — 2

National Industrial Recovery Act, C 90, 48 Stat. 195:
- Sect. 215 (Appendix p. 10-11) — 4
- Sect. 216 (Appendix p. 10-11) — 11

Revenue Act 1938, Sect. 601(f) (2) (Appendix 11) — 6

H. R. Report 1869, 75th Congress, Third Session, Committee Ways and Means Accompanying H. R. Report 9682, Internal Revenue Bulletin No. 1, January 2, 1939, p. 59 — 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 176

HAGGAR COMPANY,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

Respondent.

BRIEF FOR PETITIONER

I

The Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals (R. 44-48) is reported in 104 Fed. (2) 24, as Haggar, Petitioner, vs. Commissioner of Internal Revenue, Respondent, and that of the United States Board of Tax Appeals in 38 B. T. A. 141.

II.

Jurisdiction

1. The date of the judgment to be reviewed is May 23, 1939 (R. 48). Motion for rehearing (R. 49-50) was overruled June

17, 1939 (R. 51).

2. The Honorable Circuit Court of Appeals affirmed the decision of the United States Board of Tax Appeals in favor of Respondent upon the ground that Sec. 215 (f) of the National Industrial Recovery Act did not permit a capital stock tax return, once filed, to be amended, even within the time fixed for the original filing of the return.

3. The jurisdiction of this Honorable Court was invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347, and Supreme Court Rule 38, Sect. 5(b).

4. Certiorari was granted because the decision of the Honorable Circuit Court of Appeals for the Fifth Circuit is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Glenn vs. Oertel Company*, 97 Fed (2) 495, and of the Court of Claims in *Philadelphia Brewing Co. vs. United States*, 27 Fed. Supp. 583.

III.

Statement of the Case

On August 22, 1933, Petitioner, a Texas corporation, filed its capital stock tax return pursuant to Section 215(d) and (f) of the National Industrial Recovery Act (48 Stat. 195-208), giving as the declared value of its capital stock, its par value of $120,000.00; petitioner assuming that the Act called for a declaration of such par value (R. 22).

On September 28, 1933, and within the extended time (Treasury Decisions Nos. 4368 and 4386) for filing capital stock tax returns for the year ending June 30, 1933, petitioner, in good faith, filed a second or amended capital stock tax return, declaring the actual value of its capital stock at $250,000.00 (R. 23).

On March 15, 1934, petitioner filed its income and excess profits tax return for 1933, in which it inadvertently computed excess profits tax exemption at 12½ per cent of $370,000.00 stead of $250,000.00 as it intended, and now claims is the proper basis for compution of its excess profits tax.

Respondent, contending that the declared value in the return of August 22, 1939 should control, assessed a deficiency $1,376.52 excess profits tax against petitioner on March 3, 37 (R. 26). An appeal to the Board of Tax Appeals (filed ay 28, 1937, R. 2), being against petitioner (R. 11-15), it ed a petition for review in the United States Circuit Court Appeals for the Fifth Circuit (R. 16-21), where the decision of the United States Board of Tax Appeals was affirmed the ground that, under Section 215(f) National Industrial ecovery Act, a capital stock tax return could not be amended ithin the time for filing returns (R. 44-48).

IV.

Specification of Error

The Honorable Circuit Court of Appeals erred in holding hat petitioner's capital stock tax return, filed pursuant to ection 215(f) of the National Industrial Recovery Act on ugust 22, 1933, could not be and was not amended by the econd return filed September 28, 1933, and within the extended time for filing capital stock tax returns for the year ending une 30, 1933.

V.

Summary of Argument

1. The inhibition against amending the "first return" made ursuant to Section 215(f) National Industrial Recovery Act as not intended to prohibit amendment of a return within the

time permitted for filing the first return, but only to prohibit amendment of the return for the first year so that it might remain as the basis for computing excess profits taxes for subsequent years.

2. To construe the Act as prohibiting the correction of errors by amendment within the time for filing the first return would make it violative of the due process clause of the Fifth Amendment.

Argument

1. Sect. 215(f) of the National Industrial Recovery Act is, in part, as follows:

> "For the first year ending June 30 in respect to which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its *first* return under this section (which declaration of value cannot be amended), as of the close of its last income taxable year ending at or prior to the close of the year for which the tax is imposed by this section.*** For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value," etc.

Broadly, the question involved is whether a return once filed pursuant to the above provision may be amended within the time provided for filing the first return; specifically, whether the word "first" (underscored above) means the first paper filed in an effort to make the return provided by the Act, or the return, original or amended, for the first year.

The United States Circuit Court of Appeals for the Sixth Circuit, in *Glenn vs. Oertel Co.*, 97 F. (2d) 495, upon consideration of the Congressional intention, as reflected by the entire Act and Conference Reports, held that the Act was not intended to lay a tax upon errors of the taxpayer; that since the return for the first year was to be the basis for taxation for

future years, it was this return which could not be amended; and hence that there was no inhibition against an amendment of the first return within the time allotted for making the return. This reasoning was followed, with like result, in *Philadelphia Brewing Co. vs. United States*, 27 Fed. Supp. 583.

And since the filing of the petition for certiorari in this cause, the United States Circuit Court of Appeals for the Fourth Circuit, on August 28, 1939, in *C. H. Mead Coal Co. v. Commissioner*, 394 C. C. H. ¶ 9678, made a like holding in construing Section 114 (b) (4) of the Revenue Act of 1934. In passing on the matter the court said:

> "In using the words 'first return' Congress evidently intended to include a completed first return or a first return as properly amended and did not intend to limit the taxpayer's right of election to the first form filed. Any other construction would, in fairness to the taxpayer, be too narrow and restricted. A first return is no less a first return because amended, provided the amendment be timely and is made to correct a mistake, made without any intent on the part of the taxpayer to take any undue advantage as to its tax payments, and without any bad faith. A different construction would, as said in the case of Glenn v. Oertel Co., 97 Fed. (2d) 495 (38-2 USTC Par. 9369), permit the government to lay a tax upon the taxpayer's errors rather than its income."

The Circuit Court of Appeals in this case, 104 F. (2) 26, 27, rejected the reasoning in *Glenn vs. Oertel*, supra, in favor of the assumed literal meaning of the words used, and the supposed legislative intention reflected by administrative interpretation and subsequent enactments. The court said:

> "The administrative interpretation of this and subsequent provisions in later revenue acts, incorporated in the Treasury Regulations, followed by subsequent enactments in which the same language is used, leaves no doubt

as to the legislative intent. The declared legislative purpose being to make the first return filed under the Act the basis of the computation of the tax, and recognizing the possibility that amended returns might be attempted the Congress expressly provided that the first declaration of value was not subject to amendment."

A review of subsequent legislation does not sustain the holding of the Honorable Circuit Court of Appeals, but to the contrary shows a legislative repudiation of the administrative interpretation of the Act in the respect here involved.

While *Glenn vs. Oertel Co.*, 13 Fed. Supp. 651, was pending on appeal from the decision of the District Court, an amendment was made, in the 1938 Revenue Act, designed to relieve taxpayers who made timely correction of "errors in calculation and other errors" in their declaration returns. Since the matter was then before the Circuit Court of Appeals, the Congress is presumed to have known that the administrative interpretation of this provision of Section 215(f) had been judicially challenged, and the results of it. It is therefore significant that in the amendment to the 1938 Act, the disturbing word "first" was eliminated from Sect. 601(f) (2), corresponding to Sect. 215(f) here involved. (See Appendix, p. 11, infra.)

The parenthetical phrase "(which declaration of value cannot be amended)" was left as originally enacted. This latter phrase leaves the entire section still literally susceptible of two constructions, namely, (1) that no amendment whatever can be made, and (2) that no amendment can be made after the expiration of the time for filing the return.

But while Section 601 (f) (2) of the 1938 Act is literally as susceptible to either of these two constructions as was Section 215(f) of the National Industrial Recovery Act, the following Congressional explanation removes all doubt as to the proper construction:

"The new section also alleviates the rigid provision of Section 105(f) of the 1935 Act that the valuation shall be as declared by the corporation in its 'first' return. Errors of calculation or other errors sometimes occur in first returns, and denial of all opportunity for correction appears unduly restrictive. Accordingly, the word 'first' as it appears the second time in section 105(f) of the 1935 Act, as amended, is eliminated from the corresponding language appearing in subsection (f) (2) of the new section. This will serve to give a corporation the right, so long as it acts within the time allowed for filing its return (including the last day of any extension period) for the year for which a declaration of value is required, to file subsequent returns for that year showing a different valuation, the valuation shown by the last timely return being binding." (See H. R. Report 1869, 75th Congress, Third Session, Committee on Ways and Means accompanying H. R. 9682, Internal Revenue Bulletin, No. 1, January 2, 1939, page 59).

There is no intimation that Congress in 1938 was making ny new discoveries or evolving any new philosophy of taxaion. It is fair to assume that the Ways and Means Comittee's criticism is an indictment of the narrow administrative onstruction that had resulted in the "denial of all opportunity or correction" of a "timely return" for a "declaration year." 3y the time the 1938 Act was passed, repeated reactments nd five years use had made the principle of binding capital tock tax declarations universally familiar to all taxpayers. There was no reason why, in view of this familiarity with the ovel taxing principle, more consideration should be given to he 1938 taxpayer than to the 1933 taxpayer who had been alled upon to make a return, for the first time, without knowedge of the principles underlying, or of his rights under, the ovel legislation. Hence the elimination of the word "first" annot be regarded as evidence of an intent to change the eaning of the former Act. Since the word had produced liti-

gation and caused an administrative interpretation which Congress characterized as "unduly restrictive," it is more reasonable to assume that "the purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law." *Helvering vs. New York Trust Co.*, 292 U.S. 455, 469, 54 S. Ct. 806-808.

There is no evidence of a legislative intention, either in the Act involved or subsequent enactment, to create provisions "unduly restrictive" of the right, universally recognized, of correcting honest mistakes.

2. The construction contended for by Respondent would render the Act unconstitutional, as depriving taxpayer of its property arbitrarily, and without due process of law. Petitioner overlooked instructions attached to the form for making return; and, assuming that it was required to do so, returned as the value of its stock its par value of $120,000.00 (R. 22). Being advised of its error, taxpayer, in good faith, attempted to amend its return by filing a second return declaring the actual value of its stock at $250,000.00 (R. 23). If this amendment be not allowed, petitioner is taxed upon a wholly arbitrary basis, upon its errors, and not its income.

It has many times been stated that:

> "Taxes are assessed on income and not on honest mistakes of the taxpayer." Morrow, Meek, et al vs. Ewing (C. C. A. 5), 57 (2d) 1.

It is logical to assume that Congress intended the taxpayer to declare a fair and reasonable value on its capital stock, and to base the tax on this value rather than to set up a method for arbitrarily levying a tax. If it be assumed that the tax is designed, as the Honorable Circuit Court of Appeals implies, to exact from the taxpayer everything that can be exacted from errors committed, and to lay a tax wholly without reference to values, then the tax is so arbitrary and capricious as to fall

before the due process clause of the Fifth Amendment.

> "That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment is settled. Nichols v. Coolidge, 274 U.S. 531, 542, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A.L.R. 1081; Brushaber v. Union Pacific R. R. Co., 240 U.S.L. 24-25, 36 S. Ct. 236, 60 L. Ed. 493; L. R. A. 1917D, 414, Ann. Cas. 1917B, 713; Tyler v. United States, supra, 281 U.S. 504, 50 S. Ct., 74 L. Ed. 991, 69 A. L. R. 758." (Quoted from Heiner v. Donan, 285 U. S. 312, 52 S. Ct. 358).

The denial of the right to amend the first return within the time allotted for filing the first return would deprive petitioner of the rights accorded all other taxpayers who delayed the filing until the end of the extended time. Such denial would be discriminatory, and the tax based upon such a return a penalty. It would deprive petitioner of its property without due process of law.

Every consideration of reason and justice demands that an opportunity be given to correct honest mistakes. Doubts as to the proper construction of provisions which would deny this right should be "decided in favor of the taxpayer." Gould vs. Gould, 245 U.S. 151.

WHEREFORE, petitioner prays that the judgment of the United States Circuit Court of Appeals be reversed, and that petitioner have such other and further relief in the premises as to this Honorable Court shall seem meet and just.

Respectfully submitted,

LLOYD E. ELLIOTT,
Dallas, Texas,
Attorney for Petitioner,
Haggar Company.

O. D. BRUNDIDGE,
Dallas, Texas,
Of Counsel.

APPENDIX

National Industrial Recovery Act, C 90, 48 Stat. 195:

SEC. 215(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed * * *. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

SEC. 215(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value can not be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. * * *

SEC. 216(a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 214, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock. * * * as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

Revenue Act of 1938

SECTION 601 (f) (2)

For each declaration year the adjusted declared value shall be the value as declared by the corporation in its return for such declaration year (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending with or prior to the close of such declaration year (or as of the date of organization in the case of a corporation having no income-tax taxable year ending with or prior to the close of such declaration year).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 176.

HAGGAR COMPANY, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONER.

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INDEX.

	Page
Reply Brief for Petitioner	1
Constitutional Question	14
Appendix	16

CITATIONS.

Cases:

Blake & Kendall Co. v. Commissioner, 104 Fed. (2d) 679	11
Glenn v. Oertel Co., 97 Fed. (2d) 495	3, 4, 11, 14
Gould v. Gould, 245 U. S. 151	11
Grant v. Rose, 24 Fed. (2d) 115	12, 13
Heiner, Collector v. Donnan et al., 285 U. S. 312, 329, 52 S. Ct. 358, 362	15
Helvering v. New York Trust Co., 292 U. S. 455	10
McIntosh v. Wilkinson, 36 Fed. (2d) 807	12
Mead, C. H., Coal Co. v. Commissioner, 106 Fed. (2d) 388	3
Pacific National Co. v. Welch, 304 U. S. 191, 58 S. Ct. 857	13
Philadelphia Brewing Co. v. United States, 27 Fed. Supp. 583	2, 3, 4
Rose v. Grant, 39 Fed. (2d) 340	13
Rosoff Tunnel Corpn. v. Higgins, 28 Fed. Supp. 880	11
Scaife, Wm. B. & Sons Co. v. Driscoll, 94 Fed. (2d) 664; Cer. Den. 305 U. S. 603	11
Standard Oil Co. of Ky. v. Hawkins, 74 Fed. 395	12
Webster v. Commissioner, 37 B. T. A. 800	11

National Industrial Recovery Act of 1933

Sec. 215 (f)	1, 2, 3, 4, 7, 10
Sec. 216	1

Revised Statutes

Sec. 3224	11

Revenue Acts — Page

Sec. 701, Act of 1934 ..... 7, 10
Sec. 105, Act of 1935 ..... 9, 10
Sec. 601, Act of 1938 ..... 4, 7, 8, 10

Private Act

No. 199, 75th Cong. (c. 440, 50 Stat. 414) 14

Treasury Regulations

Regs. 64 (1933 ed.) 7, 9
Regs. 64 (1934 ed.) Art. 42 7
Regs. 64 (1936 ed.) Art. 44 ..... 8, 9, 17
Regs. 64 (1938 ed.) Art. 44 ..... 4, 5, 8, 16

Miscelllaneous

Internal Revenue Bulletin No. 1, Jan. 2, 1939, p. 59. 6
H. Rep. No. 1860, 75th Cong. 3rd Sess. 4, 6, 9

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HAGGAR COMPANY, *Petitioner*,

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REPLY BRIEF FOR PETITIONER.

Petitioner is in agreement with the repeated assertion of respondent in his brief that under Section 215 (f) of the National Industrial Recovery Act, the taxpayer has absolute discretion to determine the adjusted declared value of its capital stock for the first year, which is the one involved in the present case (Br. 9). We agree with respondent that it was the intention of Congress under the plan of the Act as carried out in Sections 215 and 216 that the truth or untruth of taxpayer's declaration of value was purposely made irrelevant. We agree with respondent that the taxpayer had the right to declare "any valuation, no matter how fantastic," which it might choose,

in its first return under Section 215 (f) and that the Commissioner of Internal Revenue is without authority himself to change it.

We agree with respondent that the purpose of the Act was to avoid the controversies over valuation which had been experienced under prior revenue acts and that adequate protection was afforded to the Government by the combined operation of the capital stock and excess profits taxes (Br. 14).

We believe however that the purpose of the capital stock tax and excess profits tax provisions of the National Industrial Recovery Act were accurately stated by Judge Littleton of the Court of Claims in *Philadelphia Brewing Co.* v. *United States*, 27 Fed. Supp. 583, (motion for new trial denied and second motion filed November 8, 1939) when he said:

> "In the Conference Report on Section 701 of the Revenue Act of 1934, which carried forward the provisions of section 215 of the National Industrial Recovery Act (Congressional Record, Vol. 78, Part 7, p. 7827), it was said by the managers on behalf of the House of Representatives that 'For the first year the tax is measured by the value of the capital stock as declared by the corporation as of the close of its last taxable year ending on or before June 30, 1934. The value of the capital stock having been declared for the first year, such value may not be subsequently amended.' Inasmuch as the primary purpose of the statute was to require the taxpayer to make a declaration of the value of its capital stock at the close of its last capital-stock tax year ending on or before June 30, 1934, and to be subsequently bound thereby in subsequent capital-stock tax years and each income-tax year ending after the close of the first taxable capital-stock year, no reasonable rule of interpretation requires the conclusion that the corporation may not, within the time allowed for filing a capital stock-tax return for the first year, declare the value of its stock upon which it intends to stand and be bound in subsequent years in a timely corrected or amended return disclosing a de-

cared value different from the value previously stated in a capital stock-tax return filed for such year. *Glenn v. Oertel Company*, 97 Fed. (2d) 495. The statute was not dealing specifically with returns as such, but with value and taxable years."

See also *C. H. Mead Coal Co.* v. *Commissioner*, 106 Fed. (2d) 388 (C. C. A. 4th).

Inasmuch as we agree with respondent that Congress intended taxpayers in their returns for the first year under Section 215 (f) of the National Industrial Recovery Act, to be entirely free to select any value upon which they intended to stand and be bound in subsequent years, it is not our intention as suggested by respondent (Br. 14-15) to argue that petitioner's right to amend depends upon the correctness or incorrectness of the intended declaration of $250,000 or the improvident unintentional declaration of $120,000.

While mistakes involving actual value may have been made in the improvident declarations in *Glenn* v. *Oertel Company*, 97 Fed. (2d) 495, and in the *Philadelphia Brewing Co.* v. *United States, supra,* cases, we do not believe that the right to correct or substitute an unintended declaration (within the time during which a timely declaration might be made) is a necessary condition precedent to the right to substitute an intended declaration of value, for an unintended declaration prematurely and improvidently made.

There is nothing in the statement of the law in *Philadelphia Brewing Co.* v. *United States, supra,* to indicate that that case was predicated upon any supposed right to correct a mistake involving the truth or untruth of value.

On page 13 of respondent's brief it is argued that the language of the Act is clear and not susceptible of varying shades of meaning. It is also argued that there can be no construction when there is nothing to construe. That there is something to construe, we believe is clearly indicated by the following:

The Commissioner of Internal Revenue in his current Regulations, Article 44 of Regulations 64 (1938 ed.) at present construes the parenthetical words "which declaration of value cannot be amended" as permitting an amendment in a subsequent return filed within the period for making an original declaration of value under Section 601 (f) (2) of the Revenue Act of 1938. This same construction was applied to the identical prohibition against amendment by the House Committee on Ways and Means (H. Rep. 1860, 75th Cong. 3rd Session) of which as pointed out by respondent (Br. 18) fifteen members including the Chairman considered and reported on Section 601 of the 1938 Act as well as Section 215 of the National Industrial Recovery Act of 1933.

In his brief (Br. 17-18) respondent has unequivocally approved as correct, the view that the identically worded parenthetical prohibition against amendments contained in the 1938 Act is to be construed as permitting "a second return to be filed before the due date of the first one." The same construction of this identical phrase also has been adopted by the Court of Claims in *Philadelphia Brewing Co.* v. *United States*, *supra*, and by the United States Circuit Court of Appeals for the Sixth Circuit in *Glenn* v. *Oertel Company*, *supra*.

The only other words in Section 215 (f) of the National Industrial Recovery Act which might be construed either to prevent or not to prevent amendment within the time for filing first returns as extended are the words "first return under this section." To construe these latter words in such an "unduly restrictive" sense as to mean *the first document or piece of paper filed under this section as a return*, would render the parenthetical prohibition against amendment wholly superfluous and redundant.

Obviously if such an "unduly restrictive" construction, denying all opportunity for correction, had been intended, it would have been wholly unnecessary for Congress also to have added, as it did, the words "which declaration of

value cannot be amended." Therefore, the fact that Congress considered it necessary to add those words, indicates that it believed them to have a necessary added meaning not otherwise embodied in the words "first return under this section." This sensible view makes it reasonable therefore to construe those latter quoted words as alluding merely to the return for the first year under this section, as distinguished from returns for "any subsequent year ending June 30."

The prohibition against amendments which has appeared in every capital stock tax law commencing with the National Industrial Recovery Act is worded as follows:

"which declaration of value cannot be amended."

The prohibition was not against amending *returns* but against amending *declarations* of value. With this in mind, therefore, and considering that the declaration provided for in the Act was not due to be made until the last day for filing a return as extended, on which date, the tax itself became due, namely, September 29, 1933, declarations of value for the first year would not become effective until that date.

Inasmuch as it was the purpose of Congress that taxpayers were freely to choose the value by which they were to be bound in subsequent years, it is not a violation of the letter of the law or the purpose of Congress to permit a taxpayer, in attempting to exercise that free choice, to withdraw an improvident and unintended declaration and substitute a declaration freely intended by him, in accordance with the obvious purpose of Congress.

It is most significant that the Commissioner of Internal Revenue in Treasury Regulations 64, (1938 Edition), Article 44 construes the identically worded prohibition against amendments "which declaration of value cannot be amended" as follows:

"A corporation making a declaration of value on a return filed within the statutory period for filing re-

turns (up to and including the last day of any extension period) may, before the expiration of such period, change, amend, or correct the value by filing another return to take the place of the one previously filed. However, in such case, the last return received by the collector within the prescribed period constitutes the return required by law and the value declared thereon become the declared value." (See Appendix, p. 16)

In the 1938 Act there has been no fundamental change from the purpose of the plan of capital stock and excess profits taxes under the National Industrial Recovery Act to make the above quoted regulation any more applicable to the capital stock and excess profits tax law of 1938 than to such laws in the National Industrial Recovery Act. The fundamental purpose has been the same in every act commencing with the National Industrial Recovery Act, namely, to make the declaration freely adopted by the taxpayer in his return for the first year under the law, binding upon him (except for the adjustments specifically provided for) for all subsequent years for both capital stock and excess profits tax purposes. That this fundamental purpose will be rigidly served under the construction contended for by petitioner is certainly demonstrated by the adoption of the above construction of the prohibition against amendments by the Commissioner of Internal Revenue in his current regulations.

The construction of this prohibition against amendments contended for by respondent is admitted by him (Br. 18) and by the Committee on Ways and Means of the 75th Congress (Br. 18) to be "unduly restrictive." See also Internal Revenue Bulletin, No. 1, January 2, 1939, page 59, (petitioner's brief, page 7).

On pages 19 and 20 of respondent's brief reference is made to what is called "the consistent administrative construction expressed in the regulations" and the "undeviating administrative construction, which has enjoyed legislative approval through reenacting of the statutory provi-

sion without material change." Respondent argues that this so-called "consistent" and "undeviating administrative construction" should be regarded as establishing the proper construction of Section 215. However, the construction by the Commissioner of Internal Revenue of this prohibition against amendments has been anything but "consistent" or "undeviating."

We are concerned here with the construction of Section 215 (f) of the Revenue Act of 1933, and particularly with the effect of the parenthetical prohibition against amendments "which declaration of value cannot be amended." This prohibition has been included in every capital stock tax law beginning with Section 215(f) of the National Industrial Recovery Act down to and including Section 601 (f) (2) of the Revenue Act of 1938.

Treasury Regulations 64 (1933 Edition) relating to the capital stock tax under Section 215 of the National Industrial Recovery Act contained the following in its construction of the parenthetical prohibition against amendments:

> "This value once having been declared may not subsequently be changed either by the corporation or by the Commissioner."

In Treasury Regulations 64 (1934 Edition) relating to the capital stock tax under Section 701 of the Revenue Act of 1934, which was substantially the same as the previous law, the Commissioner did not adhere consistently to the above quoted simple sentence. On the contrary, in Article 41, it defined "first return" as meaning "the first capital stock tax return filed by a corporation for its first taxable year," and in Article 42, included the following:

> "Extreme care should be exercised by the corporation in making this original declared value, for the reason that when the value has been declared such value cannot be changed, amended, or corrected, either by the corporation or by the Commissioner; when the right to declare such original declared value has been exercised, the right does not recur."

These regulations, it will be seen, are somewhat more restrictive, although following a similarly worded Act, than the previous regulations.

Treasury Regulations 64 (1936 Edition) relating to capital stock tax under Section 105 of the Revenue Act defined the term "original declared value" as meaning the value "as declared by the corporation in its first return for its first taxable year." Article 44 of those regulations included the following:

> "A subsequent return declaring a different value, even though filed before the expiration of the prescribed period, is therefore not acceptable under the statute."

It will be seen, that each new regulation becomes more and more "restrictive" in its interpretation of the identically worded prohibition until finally in the 1936 Edition the interpretation has become "unduly restrictive." However, Treasury Regulations 64 (1938 Edition) Article 44, relating to capital stock tax under Section 601 of the Revenue Act of 1938, construed these same words "which declaration of value cannot be amended," which had been used uniformly in all previous capital stock tax laws, commencing with the National Industrial Recovery Act, as permitting a second return to be effective if filed before the due date of the first one. See quotation from Article 44 pages 5 and 6 of this brief. This regulation is an exact reversal of the immediately preceding regulations.

The above complete history of the administrative construction of the words "which declaration of value cannot be amended," is too deviating and too inconsistent to have the force and effect of law. If these constantly changing regulations had the force and effect of law the Commissioner of Internal Revenue could amend the law at will. We are satisfied that he has no such authority.

The only construction by the Commissioner, which can be regarded as having the force and effect of law under the

rule of law, sought to be invoked by the respondent, is his construction in Treasury Regulations 64 (1933 ed.). This construction is consistent with and does not seek to add anything to the law, it merely paraphrases substantially the wording of the law. This construction which is consistent with petitioner's view is worded as follows:

> "This value once having been declared may not subsequently be changed either by the corporation or by the Commissioner."

It was not until the regulations under a subsequent Act (Regs. 64 (1936 ed.) under the Act of 1935) were promulgated that the provision was inserted specifically *prohibiting* the amendment during the time for filing. This subsequent construction being in effect overruled by the regulations under the 1938 Act, certainly cannot be regarded as having the force and effect of law retrospectively in construing the National Industrial Recovery Act of 1933. After the regulations prohibiting a timely amendment were promulgated, Congress never passed a law approving such regulations (Regs. 64 (1936 ed.)), because, in passing the next law, namely, the Revenue Act of 1938, the Committee clearly indicated that any construction preventing a timely amendment would be "unduly restrictive." While it has been suggested by respondent (Br. 17-19) that this criticism was addressed by the Committee only to the word "first" as it appeared the *second* time in Section 105 (f) of the 1935 Act, and that only the elimination of this word had the effect of justifying the changed construction, it would be more reasonable to regard the elimination of this word as a mere clarifying amendment and not as one affirmatively changing the actual meaning of the original law. Certainly the Ways and Means Committee did not intend to *approve* by its report, a construction of the previous laws, which it was specifically *condemning* as "unduly restrictive."

It is more logical to assume therefore that Congress had in mind that, in the light of what the Supreme Court said

in *Helvering* v. *New York Trust Company*, 292 U. S. 455, 468, 469, 54 S. Ct. 806, 810, that variation would be regarded as intended merely "to clarify what was doubtful and so to safeguard against misapprehension as to existing law."

In any event it is obvious that the real change effected by Section 601 of the 1938 Act was making new declarations binding for only *three years* instead of *permanently* as in Section 215 (f) of the National Industrial Act, Section 701 (f) of the Revenue Act of 1934 and Section 105 of the Revenue Act of 1935.

The material language of each of the above sections of these prior laws is identical and reads as follows:

> "For *the first year ending June 30* • • • the adjusted declared value shall be the value, as declared by the corporation in its *first return under this section* (which declaration of value cannot be amended), • • •." (Italics indicate language eliminated in 1938 Act.)

The corresponding provisions of the 1938 Act are as follows:

> "For *each declaration year* the adjusted declared value shall be the value, as declared by the corporation in its *return for such declaration year* (which declaration of value cannot be amended), • • •." (Italics indicate language substituted in 1938 Act for that eliminated from earlier acts.)

Thus the changes involved eliminating the words "first year" and "first return." Obviously the correlative significance of the two words "first" in the earlier acts disappeared with the plan to make declarations binding for three successive years. Congress did not have to eliminate the words "first year" in order to permit the correction of errors in declaration returns filed within the time for filing returns. The phrases "first year" and "first return" under the earlier Acts had a definite relation toward one another corroborated by their simultaneous elimination un-

der the new plan. The words "*first* return" obviously mean return for the "*first* year" as distinguished from returns for any subsequent year.

The adverse rulings in *Wm. B. Scaife & Sons Co.* v. *Driscoll*, 94 Fed. (2d) 664 (Cer. den. 305 U. S. 603), and in *Blake & Kendall Co.* v. *Commissioner*, 104 Fed. (2d) 679 (Br. 12) are the only Circuit Court of Appeals decisions cited by respondent in support of the argument that returns may not be amended even before the due date of the declaration return. Both of these cases are predicated specifically and *solely* on a construction of the words "which declaration of value cannot be amended." There is no attempt in either to construe the words "first return" themselves as meaning the first document or piece of paper filed as a return.

In *Rosoff Tunnel Corp.* v. *Higgins*, 28 F. Supp. 880, the amended return was sought to be filed "sixteen months after filing its original return." It is, therefore, not in point here. *Webster* v. *Commissioner* (Br. 13), 37 B. T. A. 800, in which case there was a very strong dissent, is on appeal to the United States Circuit Court of Appeals for the Sixth Circuit. This decision is in conflict with the view of that same Circuit in *Glenn* v. *Oertel Co., supra.* Also, *Wm. B. Scaife & Sons Co.* v. *Driscoll, supra,* is unlike the case at bar. That case was a suit to enjoin the collector from refusing to receive an amended return in lieu of the original return. The Court held that such injunctive procedure was forbidden by Section 3224 R. S. because the taxpayer had an adequate remedy at law consisting of a suit to recover tax as unlawfully collected.

As long as petitioner and respondent agree that the truth or untruth of a declaration was purposely made irrelevant it would seem to be immaterial whether or not "excuse is offered for failure to follow the clear instruction printed on Form 707 (R. 25)." (See respondent's brief, page 9.)

On page 19 of Respondent's brief there is discussed the applicability of the rule laid down by this Court in *Gould* v. *Gould*, 245 U. S. 151, regarding the resolving of doubts

most strongly against the Government. Respondent argues that the rule does not apply, on the ground that, "the statute does not operate harshly here." We believe, however, that the statute, as sought to be construed by respondent, does operate *harshly* here, and that the facts and learned discussion in the case of *McIntosh* v. *Wilkinson*, 36 Fed. (2d) 807, 811, are pertinent to illustrate that view and to be generally helpful in deciding this case. In that case a husband and his wife, in ignorance of the mere tax effect of filing joint instead of separate income tax returns, improvidently filed joint returns for 1925. Later, but still within the time for filing 1925 returns, they filed separate returns and claimed refund of the difference in tax, due to filing of separate returns. The Commissioner held that the original improvident filing of joint returns constituted a *binding election*, precluding the substitution of separate returns and denied the refund claim. Upon suit on the claim, the District Court for the Eastern District of Michigan, after a most enlightening review of the general principles of election, as applied to elections in income tax returns, allowed the refund on the ground that

> "* * * an election made by a party under a misconception of his rights, is not binding."

As to the Commissioner's ruling denying amendment, the Court quoted in part from the often cited case on elections of *Standard Oil Co. of Ky.* v. *Hawkins*, 74 Fed. 395, as follows:

> "We do not understand the law to justify so *harsh* a rule." (Emphasis ours)

As to the decision of the District Court in *Grant* v. *Rose*, 24 Fed. (2d) 115, *denying* the right of husband and wife to change from joint to separate returns *after the time for filing had expired*, the Court, in *McIntosh* v. *Wilkinson*, said at page 812 of 36 Fed. (2d), that the facts and judicial utterances in that case

"go no further than to declare the period of the statute *for making returns* to be a limitation of the period of election, beyond which the latter right ceases to exist."

Grant v. *Rose* was affirmed in *Rose* v. *Grant*, 39 Fed. (2d) 340. This latter case was cited with approval by this court in *Pacific National Co.* v. *Welch*, 304 U. S. 191, 194, 58 S. Ct. 857, 858. This latter case involved an *election* to file income tax returns on the completed transaction basis and a later attempt to amend to file on the installment basis *"after the expiration of the time within which return is to be made."* This Court left the door open to amendments *within the time for making returns* in that case, when it said:

"There is nothing to suggest that Congress intended to permit a taxpayer, after the expiration of the time within which return is to be made, to have his tax liability computed and settled according to the other method."

In the instant case, the statute does operate harshly here if construed as it was by the Circuit Court of Appeals as to prevent the taxpayer from making the declaration it clearly intended and desired to make within the time as extended for making such declarations. The intended declaration of $250,000 was rejected, although made within the prescribed period for filing, and the unintended declaration of $120,000 was forced upon taxpayer, contrary to its free will, contrary to the intention of the law, with the harsh result that the taxpayer is being required to use a lower excess profits tax credit than it desired and intended to use (12½ per cent of $120,000 or $15,000 instead of 12½ of $250,000 or $31,250). This construction of the statute operates harshly by reflecting a tax deficiency upon petitioner in the amount of $812.50, which it would not be required to pay if the statute were construed to permit the amendment sought by petitioner.

The passage of private Act 199 by the 75th Congress, First Session (c. 440, 50 Stat. 1014) in the *Jackson Casket & Mfg. Co.* case referred to by respondent on pages 16 and 17 of his brief is not in point here. In that case no timely correction of the first return under Section 105 of the 1936 Act was attempted. However, nearly a year after the first return under this section had been filed, the taxpayer was about to file its *second return under this section*, namely its return for the *second year*, ended June 30. The declaration in the first return was erroneously stated due to an error committed by the Western Union Telegraph Company. The taxpayer wanted to save itself capital stock taxes in its *second return*, namely, its return for the year ended June 30, 1937. It was then too late to make a timely correction. Taxpayer knew it was too late and the Chairman of two committees referred to in respondent's brief (R. 17) had every reason to assume, as suggested by respondent, that it was too late to amend the first return, without the aid of Congress. That case is not parallel to the instant case.

CONSTITUTIONAL QUESTION.

On pages 21 and 22, respondent urges that petitioner has shown no standing to question the constitutionality of the Act. It is stated that the pleadings do not raise any issue of valuation and that there is no evidence in the record to show that the value declared in either return represented the actual value of the shares.

We believe that the constitutional question was sufficiently brought into the petition for certiorari (pages 6 and 7 of the petition) by the combination of (a) the specification of error that the Circuit Court of Appeals erred in holding petitioner's capital stock tax return could not be and was not amended by the return filed September 28, 1933, and (b) the argument quoted from the opinion of the Circuit Court of Appeals for the Sixth Circuit, in *Glenn v. Oertel Company, supra*, to the effect that no such harsh and

far-reaching results were intended and that if they were, serious constitutional questions arise. We think this gives adequate standing to question the constitutionality of the statute, under the construction of the Circuit Court of Appeals for the Fifth Circuit that no amendment may be made.

The constitutional question is one of great general importance because, as indicated in respondent's brief (Br. 9) capital stock declarations and the excess profits taxes "of over 300,000 business corporations" are involved. If the entire scheme of taxation imposed under the plan of the statute by Sections 215 and 216, is not based on any proper subject of taxation, but is imposed without regard to true fact, on the basis of an irrebuttable presumption of fact, not intended to be consistent with true fact under "a statute creating a presumption which operates to deny a fair opportunity to rebut it," the statute "violates the due process clause of the Fourteenth Amendment." *Heiner, Collector v. Donnan et al.*, 285 U. S. 312, 329, 52 S. Ct. 358, 362. If on the face of the record, such facts are apparent as will bring this tax within this rule, this Court may, under its Rule 27, paragraph 6, "at its option," notice the error whether or not assigned or specified.

Respectfully submitted,

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APPENDIX.

Treasury Regulations 64 (1938 ed.) relating to the capital stock tax under Section 601 (f) of the Revenue Act of 1938:

ART. 44. Declared value.—In its return for each declaration year, a corporation must declare a definite and unqualified value for its capital stock. The declaration of value must be made in terms of United States dollars and be specific, as, for example, $10,000, or "Zero," in the event it is desired to indicate no value. Inasmuch as the declared value can in no case be less than zero, a declaration of a deficit or minus figure shall be considered a declaration of "Zero."

The value shall be declared as of the close of the income-tax taxable year ending with or prior to the close of the declaration year, as or of the date of organization if the corporation has no income-tax taxable year ending with or prior to the close of the declaration year. Thus, for the declaration year ended June 30, 1938, the value shall be declared as of December 31, 1937, if the corporation makes its income tax returns on a calendar year basis, or as of the close of any other month from July 1937, to and including June 1938, if its income tax returns are made on the basis of a fiscal year ending with such month. In the case of a newly organized corporation which does not have an income-tax taxable year ending with or prior to the close of the declaration year, June 30, the value shall be declared as of the date of organization.

A corporation may exercise unrestricted judgment and discretion in determining the value to be declared for its capital stock on a return for any declaration year. In making such declaration, the corporation is not bound by any previous declaration of value.

Extreme care should be exercised in making the declaration of value, since once made it can not be changed, amended, or corrected, except as otherwise provided for in this article, either by the corporation or by the Commissioner. It is not only binding with respect to the year for which declared, but is also the basis for computing adjusted value for any succeeding adjustment year or years of the 3-year period, and con-

stitutes a prime factor in computing the excess profits tax, if any, for the applicable income-tax taxable years under section 602 of the Revenue Act of 1938. **A corporation making a declaration of value on a return filed within the statutory period for filing returns (up to and including the last day of any extension period) may, before the expiration of such period, change, amend, or correct the value by filing another return to take the place of the one previously filed. However, in such case, the last return received by the collector within the prescribed period constitutes the return required by law and the value declared thereon becomes the declared value.**

(Portion printed in shaded type is exactly inconsistent with Article 44, Treas. Regulations 64 (1936 ed.).)

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 176

HAGGAR COMPANY, PETITIONER

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We do not oppose the granting of a writ of certiorari in this case.

Pursuant to Section 215 of the National Industrial Recovery Act, c. 90, 48 Stat. 195, 207–208, the taxpayer, a Texas corporation, on August 22, 1933, filed a capital stock tax return for the year ended June 30, 1933, in which it reported that the original declared value of its capital stock was $120,000 (R. 12). Within the time for filing capital stock tax returns for the year ended June 30, 1933, as extended by Treasury Decisions 4368 and 4386, 32

169011—39

Treasury Decisions, Internal Revenue, 40. 71, the taxpayer on September 28, 1933, filed a second capital stock return in which it declared the value of its capital stock to be $250,000 (R. 13). On March 15, 1934, the taxpayer filed its income and excess profits tax return for the calendar year 1933 and inadvertently computed the excess-profits tax due under Section 216 of the National Industrial Recovery Act (48 Stat. 208) on the basis of a value of $370,000 for its capital stock, that amount being the sum of the values declared in the first and second capital stock tax returns (R. 14). The Commissioner held that the value of $120,000 declared for the capital stock in the first capital stock tax return should be used in calculating the excess-profits tax and asserted a deficiency (R. 11, 14). The taxpayer appealed to the Board of Tax Appeals, contending that the value of $250,000 declared in the second capital stock tax return should be used as a basis (R. 2–7). The Board and the court below rejected that contention, holding that the value declared in the first return was controlling (R. 14, 44–48).

Section 216 of the National Industrial Recovery Act provides that the excess-profits tax is to be computed on the basis of the value of the capital stock as declared by the taxpayer in the capital stock tax return filed pursuant to Section 215 of the same Act. The Board and the court below construed Section 215 (f) as not permitting any amendment of the value of the capital stock as de-

clared in the first capital stock tax return filed under Section 215, and accordingly held that the excess-profits tax was to be computed on the basis of the declaration of value made in the capital stock tax return filed August 22, 1933, and not on the basis of the declaration of value made in the second return filed September 28, 1933.

The decision of the court below is in accord with that of the Circuit Court of Appeals for the First Circuit in *Blake and Kendall Co.* v. *Commissioner,* decided June 13, 1939, not yet officially reported but found in 1939 C. C. H., Vol. 4, ¶ 9561. The Board of Tax Appeals has consistently taken the same view. *Blake and Kendall Co.* v. *Commissioner,* decided by the Board of Tax Appeals January 12, 1939, Memorandum Opinion, unreported; *William A. Webster Co.* v. *Commissioner,* 37 B. T. A. 800, now pending before the Circuit Court of Appeals for the Sixth Circuit; *A. J. Crowhurst & Sons, Inc.,* v. *Commissioner,* 38 B. T. A. 1072, now pending before the Circuit Court of Appeals for the Third Circuit.

But the Circuit Court of Appeals for the Sixth Circuit in *Glenn* v. *Oertel Co.,* 97 F. (2d) 495, and the Court of Claims in *Philadelphia Brewing Co.* v. *United States,* 27 F. Supp. 583 (petition for rehearing pending), have held that where the second return was filed before the due date as extended by Treasury Decisions, the value of the capital stock as declared in that return should be used as a basis for the computation of the excess-profits tax.

While we believe that the decision of the court below is correct, we do not feel that the petition should be opposed in view of the direct conflict of decisions.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

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BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Summary of argument	5
Argument:	
I. The statute forbids any amendment of the first return filed	7
1. The statute in terms forbids amendment of the first return for the first year	12
2. The reasoning in *Glenn* v. *Oertel Co.*, 97 F. (2d) 495, is untenable	13
3. The literal meaning of the statute is consonant with the intent of the Congress	16
II. The statute is constitutional	21
Conclusion	24
Appendix	25

CITATIONS

Cases:	
Allied Agents v. *United States*, 26 F. Supp. 98, certiorari denied, Oct. 9, 1939, No. 41, present Term	11, 23
Beattie Inv. Co. v. *United States*, 101 F. (2d) 850	19
Blake & Kendall Co. v. *Commissioner*, 104 F. (2d) 679	13
Brewster v. *Gage*, 280 U. S. 327	20
Carmichael v. *Southern Coal Co.*, 301 U. S. 495	22
Chicago Telephone Supply Co. v. *United States*, 23 F. Supp. 471; certiorari denied, 305 U. S. 628	13, 14, 23
Connecticut Ry. Co. v. *Palmer*, 305 U. S. 493	21
Crowhurst & Sons, A. J., Inc. v. *Commissioner*, 38 B. T. A. 1072	13
Glenn v. *Oertel Co.*, 97 F. (2d) 495	13, 14
Gunning v. *Cooley*, 281 U. S. 90	21
Hamilton v. *Rathbone*, 175 U. S. 414	13
Heald v. *District of Columbia*, 259 U. S. 114	22
Helvering v. *Bliss*, 293 U. S. 144	20
Helvering v. *Reynolds Co.*, 306 U. S. 110	20
Helvering v. *Stockholms &c. Bank*, 293 U. S. 84	19
Helvering v. *Winmill*, 305 U. S. 79	20
In re 620 Church St. Corp., 299 U. S. 24	22
La Belle Iron Works v. *United States*, 256 U. S. 377	22
Lake County v. *Rollins*, 130 U. S. 662	13
Liverpool N. Y. & P. S. S. Co. v. *Commissioners of Emigration*, 113 U. S. 33	22
Mead, C. H., Coal Co. v. *Commissioner*, 106 F. (2d) 388	14
New York v. *Irving Trust Company*, 288 U. S. 329	21
Philadelphia Brewing Co. v. *United States*, 27 F. Supp. 583	13
Ray Consolidated Copper Co. v. *United States*, 268 U. S. 373	9

Cases—Continued.	Page
Rosoff Tunnel Corp. v. *Higgins*, 28 F. Supp. 880	13
Ruggles v. *Illinois*, 108 U. S. 526	13
Scaife, William B., & Sons Co. v. *Driscoll*, 94 F. (2d) 664, certiorari denied, 305 U. S. 603	12
Sonzinsky v. *United States*, 300 U. S. 506	21
State Railroad Tax Cases 92 U. S. 575	9
Tennessee Pub. Co. v. *American Bank*, 299 U. S. 18	22
Thompson v. *United States*, 246 U. S. 547	13
United States v. *Hartwell*, 6 Wall. 385	13
United States v. *Shreveport Grain & El. Co.*, 287 U. S. 77	13
Webster, William A., Co. v. *Commissioner*, 37 B. T. A. 800	13
White v. *United States*, 305 U. S. 281	19
Statutes:	
National Industrial Recovery Act, c. 90, 48 Stat. 195:	
Sec. 215	25
Sec. 216	27
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 701 (U. S. C., Title 26, Sec. 1358)	9
Sec. 702 (U. S. C., Title 26, Sec. 341)	9
Sec. 703	9
Revenue Act of 1935, c. 829, 49 Stat. 1014:	
Sec. 105 (U. S. C., Supp. IV, Title 26, Sec. 1358)	16
Revenue Act of 1938, c. 289, 52 Stat. 477:	
Sec. 601 (U. S. C., Supp. IV, Title 26, Sec. 1358)	18
Act of July 6, 1937 (Private, No. 199), c. 440, 50 Stat. 1014	16
Miscellaneous:	
1 Bonbright, *Valuation of Property* (1937):	
Pt. 1, pp. 3–109	9
Pt. III, pp. 562–595	9, 10
H. Rep. No. 777, 75th Cong., 1 Sess.	17
H. Rep. No. 1860, 75th Cong., 3d Sess, p. 62	18
H. R. 5258, Private, No. 199, 75th Cong., 1st Sess.	16
1 Int. Rev. Bull. 59 (1939)	18
Income Tax Return, Form 707, Instructions, par. 3	19
S. Rep. No. 52, 69th Cong., 1st Sess., pp. 11–12	10
S. Rep. No. 114, 73d Cong., 1st Sess., p. 6	10
S. Rep. No. 558, 73d Cong., 2d Sess., pp. 5–6	11
S. Rep. No. 730, 75th Cong., 1st Sess.	17
Sharfman, *The Interstate Commerce Commission* Pt. III A (1935) p. 39	10
Treasury Decisions 4368 and 4386	3
Treasury Regulations 64 (1933 ed.) Art. 24	27
Treasury Regulations 64 (1934 ed.):	
Art. 41 (a)	28
Art. 41 (d)	28
Art. 42	28
Treasury Regulations 64 (1936 ed.):	
Art. 21 (j)	29
Art. 21 (t)	30
Art. 44	30

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 8–12) is reported in 38 B. T. A. 141. The opinion of the Circuit Court of Appeals (R. 28–32) is reported in 104 F. (2d) 24.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 23, 1939 (R. 32). A petition for rehearing was denied on June 17, 1939 (R. 33). The petition for a writ of certiorari was filed July 5, 1939, and was granted October 9, 1939. The

jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a capital stock tax return filed pursuant to Section 215 (f) of the National Industrial Recovery Act may be amended within the time fixed for filing returns.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statue and regulations appear in the Appendix, *infra*, pp 25–30.

STATEMENT

The pertinent facts, which the Board of Tax Appeals found (R. 8, 9–11) as stipulated (R. 16–26), may be summarized as follows:

The petitioner, a Texas corporation with its principal office in Dallas, was in existence and doing business during 1933 and prior years (R. 16). On August 22, 1933, it filed a capital stock tax return for the year ending June 30, 1933, stating an original declared value for its entire capital stock of $120,000, the par value of its shares of common then outstanding (R. 17, 24A). Simultaneously, it paid the tax of $120 shown on the return to be due (R. 17). The petitioner filed the return upon the assumption that the par value, and not the actual value, of the stock should be declared and did not give consideration to paragraph 3 of the Instruc-

tions attached to Form 707 upon which the return was made (R. 17).[1]

On September 28, 1933, the petitioner filed a second capital stock tax return for the year ending June 30, 1933, in which the value of its capital stock was declared to be $250,000 (R. 18, 24B). On the same date it paid to the Collector of Internal Revenue the tax of $250 shown to be due on that return (R. 18). The time for filing capital-stock-tax returns for that year, originally fixed as July 31, 1933, had been extended by Treasury Decisions 4368 and 4386 to September 29, 1933 (R. 17). The return was

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[1] Paragraph 3 reads as follows (R. 25):

"3. *Original declared value.*—The corporation is required by the act to declare a value for its entire capital stock as of the date of the last income-tax taxable year ending on or prior to June 30, 1933, or as of the date of organization in the case of a corporation having no income-tax taxable year ending on or prior to June 30, 1933. Such original declared value is not subject to any amendment either by the Commissioner or by the corporation. However, if the net income for the income-tax taxable year immediately following the date shown in item 7, on the reverse side, is in excess of 12½ percent of such declared value, an excess-profits tax of 5 percent is imposed by section 216 of the act on the portion of the income that is in excess of 12½ percent.

"In arriving at the original declared value, the value of the corporation's business and property as an entirety and as a going concern should be considered, and in doing so, it should look to the net worth of the corporate assets, including its surplus and undivided profits as shown by the books, also to the franchise, good will, outstanding contracts, the earning capacity of the corporation, and the market value of its shares of stock. After having done so, the corporation should then determine the original declared value for its entire capital stock according to its best judgment."

accepted by the Collector on the assumption, based upon a difference in the names appearing on the two returns, that the second one was made for a different corporate taxpayer (R. 18, 24A–B). Upon disclosure that the two returns were for the same corporation, the petitioner was advised that the second return could not be accepted (R. 18, 25–26).

On August 9, 1937, the petitioner filed a claim for refund of the $120 capital stock tax paid on August 22, 1933. This claim was rejected on November 26, 1937 (R. 19). The petitioner, on August 13, 1937, also filed a conditional claim for refund of the $250 capital stock tax paid, and a Treasury check for $312.58 ($250 plus interest) was tendered to the petitioner (R. 19). The petitioner did not cash the check, but retendered it to the Government, which refused to accept it (R. 19).

On March 15, 1934, the petitioner filed its income and excess-profits tax return for the calendar year 1933 (R. 18, 24C–F). Through inadvertence it computed its excess-profits tax exemption at 12½ per cent of $370,000, which is the total declared value shown in the two capital-stock-tax returns filed by it (R. 18–19, 24C). The Commissioner determined a deficiency calculated upon the basis of a declared value of $120,000 as shown in the petitioner's original capital-stock-tax return filed August 22, 1933 (R. 3, 11).

The petitioner contended before the Board of Tax Appeals that the value of $250,000 shown in its

second capital-stock-tax return filed September 28, 1933, should be used in the computation of the tax on excess profits (R. 11). The Board rejected that contention and sustained the Commissioner's determination (R. 11–12). The Circuit Court of Appeals affirmed the decision of the Board and held that the declared value listed in the first return was the proper basis for the computation of the excess-profits tax (R. 28–32).

SUMMARY OF ARGUMENT

Sections 215 and 216 of the National Industrial Recovery Act impose interrelated taxes on domestic corporations, namely, a capital-stock tax and a tax on the profits in excess of 12½ per centum of the capital stock. The value of the capital stock, which is declared by the taxpayer in accordance with Section 215 (f), constitutes not only the measure for the capital-stock stock tax imposed by Section 215 (a) but also the base for computing the amount of the excess profits on which a tax is imposed by Section 216 (a).

Section 215 (f) provides in terms that the value of the capital stock is to be declared by the corporate taxpayer in its "first return" for the first year and that the value so declared cannot be amended. The reason for empowering the taxpayer to determine the value of its stock is to avoid all controversy over valuation. The scheme is rendered practicable by making the capital-stock and

excess-profits taxes work against each other and by forbidding an amendment of the original declaration of value.

The terms of the statute cover this very case and forbid an amendment of the first return. The language of the statute is unambiguous and, accordingly, it is conclusive. There is no scope for a construction not in accordance with the literal interpretation adopted by the court below.

The exception read into the statute by the decisions of the Circuit Court of Appeals for the Sixth Circuit and the Court of Claims rests upon a misunderstanding of the purpose of the statute. The reasoning of those cases would put valuation in issue whenever a second return was attempted to be filed. Such a result is contrary to the intent of Congress as disclosed by the statutory provisions and by the committee reports.

Special legislation enacted for the relief of one taxpayer which reported a different value from the one it intended to report (because of a mistake of a telegraph company) indicates that Congress meant to make no exception to the literal meaning of the statute. Moreover, the legislative history of the changes made in the capital stock tax provisions of the Revenue Act of 1938 shows that Congress clearly recognized that under Section 215 (f) the value declared in the first return for the first year could not be amended for any reason. All doubts, if any ever existed, about the proper construction

of the statute, must be regarded as settled by the uniform administrative construction which should be deemed to have received legislative approval through the reenactment of the statutory provisions without material change.

The statute when construed literally raises no constitutional doubts but operates fairly in every particular. The petitioner was given complete power to determine the value of its stock and was put on notice of the consequences of its own determination. The statute, the regulations, and the instructions on Form 707 upon which the return was made all advised taxpayers of the interrelation of the capital-stock and excess-profits taxes and warned that the value originally declared by a taxpayer could not be changed.

ARGUMENT

I

THE STATUTE FORBIDS ANY AMENDMENT OF THE FIRST RETURN FILED

This is a proceeding for the redetermination of an excess profits tax deficiency for the year 1933. The sole question is whether, in computing its excess profits tax due for the calendar year 1933, the taxpayer is required to use the value of its capital stock as declared in its first capital stock tax return for the year ending June 30, 1933, or may use the value as declared in a second return which was

filed before the due date as extended by Treasury Decisions.

Sections 215 and 216 of the National Industrial Recovery Act (*infra*, pp. 25–27) impose interrelated taxes on domestic corporations, namely, a capital stock tax and an excess profits tax. For each year ending June 30, Section 215 (a) imposes upon domestic corporations carrying on or doing business an excise tax of $1 for each $1000 of the "adjusted declared value of its capital stock." Section 216 (a) imposes upon the net income of every corporation, for each income-tax taxable year ending after the close of the first capital stock tax year,[1] an excess-profits tax equivalent to 5 per centum of such portion of its net income as is in excess of 12½ per centum of "the adjusted declared value of its capital stock" determined as provided in Section 215. Thus the adjusted declared value of the capital stock which measures the tax under Section 215 also constitutes the base for ascertaining the amount of excess profits taxed under Section 216.

The adjusted declared value of the capital stock is defined in Section 215 (f), as follows: "For the first year ending June 30 * * * the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be

[1] The capital stock tax returns filed in this case were for the year ending June 30, 1933. The excess profits tax return filed March 15, 1934, was for the *calendar* year 1933 (R. 24).

amended), as of the close of its last income-tax taxable year". For any subsequent year ending June 30, the adjusted declared value is ascertained by adding or subtracting from the original declared value in accordance with actual changes made in the capital structure.[3] The taxpayer, accordingly, has absolute discretion to determine in the first instance the adjusted declared value of its capital stock for the first year which is the one involved in the present case.

The reasons for empowering the corporate taxpayer to determine the value of its capital stock are not far to seek. The so-called "actual value" of the "capital stock" of over 300,000 business corporations could not practicably be determined. The difficulties encountered in defining the terms are not inconsiderable. Compare *Ray Consolidated Copper Co* v. *United States*, 268 U. S. 373, 376–377, with *State Railroad Tax Cases*, 92 U. S. 575, 602–606.[4] In addition, even if the theory of valuation were agreed upon, an accurate appraisal of the stock equities in every corporation could not be made by the Commissioner within a reasonable

[3] Taxpayers, however, were subsequently given an opportunity to declare a new value for the year ending June 30, 1934. Revenue Act of 1934, c. 277, 48 Stat. 680, Secs. 701, 702, 703.

[4] See 1 Bonbright, *Valuation of Property* (1937), Pt. 1, pp. 3–109; Pt. III, pp. 562–595.

time or at a feasible cost.[5] These considerations were not matters of opinion merely with Congress; actual experience with the valuation provisions of the earlier federal capital stock tax had disclosed administrative difficulties that led to its repeal in 1926.[6]

The scheme of taxation erected by Sections 215 and 216 was designed to avoid controversy as to the value of the capital stock and yet to assure the determination of a reasonable value.[7] To that end,

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[5] Compare the appraisal of the railroads conducted by the Interstate Commerce Commission: Sharfman, *The Interstate Commerce Commission*, Pt. III A (1935), p. 39.

[6] See S. Rep. No. 52, 69th Cong., 1st Sess., pp. 11–12. See also the discussion of this tax in 1 Bonbright, *Valuation of Property* (1937), pp. 577–595.

[7] The report of the Senate Finance Committee accompanying H. R. 5755 contains the following statement (S. Rep. No. 114, 73d Cong., 1st Sess., p. 6):

"Section 214 provides for a new tax similar in principle to the capital stock tax which was levied from 1916 to 1926. In order to avoid controversy as to the value of the capital stock, the tax is imposed on the value declared by the corporation. A reasonable value is, however, assured by means of an excess-profits tax imposed by section 215 and based on the relation of the net income of the corporation to such declared value. A value for the capital stock once having been declared, such value may not be subsequently changed except for bona fide changes in the capital structure. The rate of this tax is very low, $1 per $1,000 of the declared value. The estimated annual yield is $80,000,000 in connection with the excess-profits tax imposed by section 215.

"Section 215 imposes an excess-profits tax on corporations. The primary object of this tax is to induce corporations automatically to declare a fair value for their corporate

the corporate taxpayer fixes the value of its stock. Its inclination to favor its own interests is effectively balanced by two other factors. First, the excess profits tax and the capital stock tax are made to work against each other. A low declaration of value, while decreasing the capital stock tax, increases the risk of a high excess profits tax. In the second place, the statute provides that the declaration of value cannot be amended, either by the Government or by the taxpayer. See *Allied Agents v. United States,* 26 F. Supp. 98 (C. Cls.), certiorari denied, October 9, 1939, No. 41, present Term.

The petitioner insists that its second return made prior to the expiration of the time for filing must be accepted by the respondent as a proper amendment of its first return. Both the Board of Tax Appeals and the court below held that under the statute there is no warrant for amending the declaration of value in the first return which is expressly made binding upon the taxpayer and the Government. This conclusion, it is submitted, is the correct one.

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stock under section 214. The rate is 5 percent on the portion of the net income in excess of 12½ percent of the adjusted declared value of the stock of the corporation. The secondary object of the tax is to subject to a somewhat higher rate of tax abnormal profits which are out of proportion to the capital of the corporation."

See also S. Rep. No. 558, 73d Cong., 2d Sess., pp. 5–6, recommending the passage of the capital stock and excess profits provisions of the Revenue Act 1934.

1. *The statute in terms forbids amendment of the first return for the first year*

Section 215(f) in terms covers the very issue presented here: "*For the first year ending June 30* in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, *as declared by the corporation in its first return under this section* (which declaration of value cannot be amended) * * *." (Italics supplied.)

The terms of the statute are unambiguous. Plainly, the value to be used is the value as declared in the *first return for the first year* and such value cannot be amended. There is no room here for a different interpretation. In order to make the plan work some one return must be selected as determinative of the tax liability. As the court below quite properly observed (R. 32): "The selection of the first, an intermediate, or the last return is a matter within the legislative discretion. In the act under consideration, the first return was selected." There is no need here to have recourse to Congressional debates to gather the meaning. Without exception the circuit courts of appeals which have faced this issue and the Board of Tax Appeals have concluded, as did the court below, that the statute, if interpreted literally, forbids amendment of the first return either before or after the time for filing has expired. *William B. Scaife & Sons Co.* v. *Driscoll*, 94 F. (2d) 664, 666 (C. C. A. 3d), certiorari denied, 305 U. S. 603; *Glenn* v. *Oertel Co.*, 97 F. (2d) 495, 496 (C. C. A. 6th); *Blake & Kendall*

Co. v. *Commissioner,* 104 F. (2d) 679 (C. C. A. 1st); *William A. Webster Co.* v. *Commissioner,* 37 B. T. A. 800.[1] Accord: *Chicago Telephone Supply Co.* v. *United States,* 23 F. Supp. 471, 473 (C. Cls.), certiorari denied, 305 U. S. 628; *Rosoff Tunnel Corp.* v. *Higgins,* 28 F. Supp. 880 (S. D. N. Y.). The language is clear and not susceptible of varying shades of meaning. Accordingly, the plain import is conclusive. "There can be no construction when there is nothing to construe." *United States* v. *Hartwell,* 6 Wall. 385, at 396. See also *Ruggles* v. *Illinois,* 108 U. S. 526, 534; *Lake County* v. *Rollins,* 130 U. S. 662, 670–671; *Hamilton* v. *Rathbone,* 175 U. S. 414, 419; *Thompson* v. *United States,* 246 U. S. 547, 551; *United States* v. *Shreveport Grain & El. Co.,* 287 U. S. 77.

2. *The reasoning in Glenn v. Oertel Co., 97 F. (2d) 495, is untenable*

The Circuit Court of Appeals for the Sixth Circuit, in *Glenn* v. *Oertel Co., supra,* held, however, that the literal meaning of the statute must give way to avoid an allegedly harsh result. The decision was followed by the Court of Claims in *Philadelphia Brewing Co.* v. *United States,* 27 F. Supp. 583. These decisions, in our opinion, are premised upon an erroneous view of the purpose of the statute. Thus the court in the *Oertel* case stresses "the necessity of a correct return for the

[1] Now pending before the Circuit Court of Appeals for the Sixth Circuit, and followed in *A. J. Crowhurst & Sons, Inc.* v. *Commissioner,* 38 B. T. A. 1072, now pending before the Circuit Court of Appeals for the Third Circuit.

first year" (see 97 F. (2d) 495, at 497; R. 31–32). That case arose upon a demurrer to the petition of the taxpayer alleging that its first return was erroneous and its second one correct. In passing upon the issue presented, the court declared (p. 496): "We cannot think that Congress intended an untrue return to be unamendable for no better or more substantial reason than that it was first in point of time". The fallacy of the argument is that the "truth" or "untruth" of the declaration of value was purposely made irrelevant. See *Chicago Telephone Supply Co.* v. *United States,* 23 F. Supp. 471, 474–475 (C. Cls.), certiorari denied, 305 U. S. 628. If Congress had desired accuracy, it would have given the Commissioner power to pass upon the valuation declared by the taxpayer. Instead, it refused the Commissioner authority to change any valuation, no matter how fantastic. The explanation, as already indicated, is that Congress desired to avoid the controversies over valuation which had been experienced under the prior revenue acts.* And adequate protection is afforded to the Government by the combined operation of the capital stock and excess profits taxes.

The theory of the *Oertel* decision, which is relied upon by the petitioner (Br. 4–5), would logically permit a taxpayer to amend its return for the first year whenever it sought in "good faith" to correct an "error." Compare *C. H. Mead Coal Co.* v.

* See notes 6 and 7, *supra.*

Commissioner, 106 F. (2d) 388 (C. C. A. 4th). The premise of the argument is that a taxpayer should be permitted to amend its first return so as to file a "correct return" for the first year as distinguished from returns for subsequent years (97 F. (2d) 495, 496–497). If the premise be sound, there is no reason for restricting the time within which an amendment may be made. Yet clearly such a result is contrary to the scheme established by Congress. It would either give some taxpayers an unfettered opportunity in later years to juggle the declaration of value so as to obtain the lowest possible combination of capital stock and excess profits taxes, or it would give rise to litigation over the "correctness" of the amended return or the "good faith" of the taxpayer in filing it. In view of the provisions of the statute and the committee reports,[10] neither intention can fairly be imputed to Congress.

Moreover, the emphasis placed upon the effect of the demurrer to the pleading and the "necessity of a correct return," suggests that the court in the *Oertel* case thought that the taxpayer must allege and prove the "error" in its first return in order to file an amended return (see 97 F. (2d) 495, at 496). In that view, every attempt to file a second or a third return would create the necessity of ascertaining which return declared the true "value" and then accepting that return. The reasoning of the *Oertel* decision would put valuation in issue no mat-

[10] See note 7, *supra*.

ter when the amended return was filed. Such a line of reasoning, it is submitted, is clearly opposed to the intent expressed in the statute. In addition, it does not aid the petitioner here. In this very case there is no assurance that the second return declared the actual value of the stock, and the Board of Tax Appeals so stated in its opinion (R. 11).

3. *The literal meaning of the statute is consonant with the intent of the Congress*

The petitioner asserts (Br. 4–9) that this Court should read into the statute an exception in favor of taxpayers who filed amended returns within the period for filing the first return. Neither the language of the statute nor the committee reports suggest that any such exception should be made.[11] Furthermore, the passage of H. R. 5258, as Private Act No. 199, by the Seventy-fifth Congress, First Session (c. 440, 50 Stat. 1014), indicates that Congress intended to make no exceptions whatever to the literal meaning of the statute. The bill was enacted for the relief of the Jackson Casket and Manufacturing Co., Jackson, Mississippi, which had filed a return under Section 105 of the Revenue Act of 1935, which is substantially the same as Section 215 of the National Industrial Recovery Act. Owing to an error attributable to a mistake of the Western Union Telegraph Company, in transmitting a mes-

[11] See note 7, *supra*.

sage from the president of the casket company, the cashier had filed the return with a declared value of $175 per share rather than $125 per share as the message from the president directed. In reporting the bill favorably, Chairman Doughton of the Ways and Means Committee and Senator Harrison, Chairman of the Senate Finance Committee, both stated that the company would secure no refund of its capital stock tax for the year 1936 as a result of the error on the part of Western Union and that the bill merely made an adjustment for subsequent years. See H. Rep. No. 777, 75th Cong., 1st Sess.; S. Rep. No. 730, 75th Cong., 1st Sess. It is significant that, even in such a meritorious case, the Chairmen of the two committees assumed, without question, that the Jackson Company could not amend its first return without the aid of Congress. This special legislation tends to show that Congress intended Section 215 (f) to be construed as it was written and that no exception was to be made even when an actual hardship was imposed on the taxpayer through no fault of its own.

Congress subsequently enacted a statute designed to create the exception which the taxpayer would read into Section 215 (f). It changed the capital stock tax provisions in the Revenue Act of 1938 so as to permit a second return to be filed before the due date of the first one. See Section 601. With respect to this change, the report of

the House Committee on Ways and Means (H. Rep. 1860, 75th Cong., 3d Sess.) contains the following explanation (at p. 62):[12]

> The new section also alleviates the rigid provision of section 105 (f) of the 1935 act that the valuation shall be as declared by the corporation in its "first" return. Errors of calculation or other errors sometimes occur in first returns, and denial of all opportunity for correction appears unduly restrictive. Accordingly, the word "first" as it appears the second time in section 105 (f) of the 1935 act, as amended, is eliminated from the corresponding language appearing in subsection (f) (2) of the new section. This will serve to give a corporation the right, so long as it acts within the time allowed for filing its return (including the last day of any extension period) for the year for which a declaration of value is required, to file subsequent returns for that year showing a different valuation, the valuation shown by the last timely return being binding.

Fifteen members of the Ways and Means Committee, including the Chairman, who considered and reported on Section 601 of the 1938 Act, also considered and reported on Section 215 of the National Industrial Recovery Act of 1933. The foregoing report, therefore, is persuasive of the understanding of the Committee that Section 215 (f)

---

[12] Also found in 1 Int. Rev. Bull. 59 (1939).

(which is substantially the same as Section 105 (f) of the 1935 Act) was intended to prohibit any amendment of the capital value originally declared, even one sought to be made in a second return filed within the period for filing the first return.

This Court has often approved the salutary rule of construction that language is not to be twisted from its natural meaning simply to make it bear less heavily against a particular taxpayer. A meaning consonant with the intention of the legislature is not to be rejected under the pretense of a strict construction in favor of the taxpayer. "To do so would be not to resolve a doubt in his favor, but to say that the statute does not mean what it means." *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 94. See also *White* v. *United States*, 305 U. S. 281, 292. In any event the statute does not operate harshly here, for there is no suggestion that the value declared was not the value intended, and no excuse is offered for the failure to follow the clear instructions printed upon Form 707 (R. 25). But even if it were otherwise, such an argument should more properly be addressed to Congress than to the courts. *White v. United States, supra; Beattie Inv. Co.* v. *United States*, 101 F. (2d) 850 (C. C. A 8th).

Moreover, all doubts, if there ever were any, about the proper construction of the statute, should now be regarded as settled by the consistent administrative construction expressed in the regulations.

The Treasury Regulations from the beginning have, with increasing particularity, denied the right of a taxpayer to amend the value of the capital stock as declared in the first return filed under Section 215 (f) and similar provisions of the subsequent revenue acts. Thus Article 24 of Regulations 64 (1933 ed.), *infra*, pp. 27–28, provided:

> This value once having been declared may not subsequently be changed either by the corporation or by the Commissioner.

Section 215 (f) was reenacted, without material change, as Section 701 (f) of the Revenue Act of 1934 and Section 105 (f) of the 1935 Act. In the regulations promulgated under those later sections, it was again provided that the original declared value of the capital stock in the first return for the first year could not be changed, amended or corrected, either by the corporation or by the Commissioner. See Arts. 41 (a), 41 (d), 42, Regulations 64 (1934 ed.); Arts. 21 (i), 21 (l), 44, Regulations 64 (1936 ed.), *infra*, pp. 28–30.

This undeviating administrative construction, which has enjoyed legislative approval through reenacting of the statutory provisions without material change, should be regarded as establishing the proper construction of Section 215 (f). See *Brewster* v. *Gage*, 280 U. S. 327; *Helvering* v. *Bliss*, 293 U. S. 144; *Helvering* v. *Winmill*, 305 U. S. 79; *Helvering* v. *Reynolds Co.*, 306 U. S. 110.

II

THE STATUTE IS CONSTITUTIONAL

The petitioner makes a general objection (Br. 8–9) that the statute, if construed literally, is arbitrary and, hence, unconstitutional. The primary argument advanced to support this contention appears to be that the statute so construed would levy a tax without reference to economic values.

In the first place, it should be noticed, the assignments of error relied upon in both the Circuit Court of Appeals (R. 15–16) and in this Court (Pet. 6–7; Br. 3) do not challenge the validity of the statute. The petition for the writ likewise seeks review only upon the ground of a conflict with the construction adopted by other federal courts and does not ask for a consideration of the constitutional question (Pet. 2–3). Accordingly, this issue may not be raised for the first time[13] in the brief of the petitioner before this Court. *Gunning* v. *Cooley*, 281 U. S. 90, 98; *New York* v. *Irving Trust Company*, 288 U. S. 329; *Sonzinsky* v. *United States*, 300 U. S. 506, 514; *Connecticut Ry Co.* v. *Palmer*, 305 U. S. 493, 496.

Furthermore, the petitioner has shown no standing to question the constitutionality of the Act. The pleadings do not raise any issue of valuation,

[13] The constitutional issue was mentioned, apparently, in a single paragraph of the brief filed with the Board of Tax Appeals (R. 11).

and there is no evidence in the record to show that the value declared on either return represents the actual value of the shares (R. 11). If the actual value of the stock is par or less, and there is no proof to the contrary, then it is difficult to see how petitioner can assert any injury. This Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. *Tennessee Pub. Co.* v. *American Bank*, 299 U. S. 18; *Liverpool N. Y. and P. S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39. The injuries claimed by the petitioner in its brief are purely hypothetical on this record. The Court should therefore refrain from passing upon a constitutional question which may well be moot in the case at bar. *In re 620 Church St. Corp.*, 299 U. S. 24, 27; *Heald* v. *District of Columbia*, 259 U. S. 114, 123.

Moreover, the argument of the petitioner ignores the statutory scheme for having the taxpayer, who is acquainted with the facts, set the valuation and for making the capital-stock tax and the excess-profits tax work against each other. Experience had demonstrated to Congress that the capital-stock tax could be administered practicably only by avoiding all controversy over valuation (see pp. 8–11, *supra*). The administrative considerations alone indicate the reasonableness of the statute. *La Belle Iron Works* v. *United States*, 256 U. S. 377, 392–393; *Carmichael* v. *Southern Coal Co.*, 301

U. S. 495, 511, 513. The contentions advanced by the petitioner have been adequately answered by those decisions in which the issue of constitutionality was squarely presented. *Chicago Telephone Supply Co.* v. *United States,* 23 F. Supp. 471 (C. Cls.), certiorari denied, 305 U. S. 628; *Allied Agents* v. *United States,* 26 F. Supp. 98 (C. Cls.), certiorari denied, October 9, 1939, No. 41.

In addition, we submit, the statute construed literally does not operate unfairly in any particular against the petitioner. No instruction on Form 707 or in the regulations suggested that a taxpayer was required to declare the value of its stock at par. On the contrary, the instructions (R. 25) advised every corporate taxpayer to consider net worth, goodwill, and earning capacity of the shares, though it was free to declare whatever value it chose. They also informed a taxpayer of the consequences of the declaration and of the fact that no change could be made. The petitioner has offered no excuse for using par as the value other than that, for reasons not shown, it overlooked the instructions printed upon Form 707. If it was injured in any way, and there is no proof of the value of the shares, clearly the responsibility rests with the petitioner. Furthermore, the value actually declared might conceivably have worked in favor of the petitioner. For instance, if the corporation had made profits of less than 12½ per centum of the par value of the shares, it would have paid no

excess-profits tax and the capital-stock tax would have been smaller than if the value in the second return were accepted.

CONCLUSION

The statute in terms covers the very case presented and forbids the amendment of the first return. The literal interpretation adopted by the court below is consistent with the purpose of Congress to avoid controversy over valuation and is confirmed by the undeviating administrative construction published in the regulations and approved by the reenactment of the statutory provisions without material change. Such a construction raises no constitutional doubts and operates fairly upon the petitioner. The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1939.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

National Industrial Recovery Act, c. 90, 48 Stat. 195:

SEC. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes im-

posed by section 600 of the Revenue Act of 1926 shall, in so far as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax-taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax-taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax-taxable year ending at or

prior to the close of the year for which the tax is imposed by this section. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

* * * * *

SEC. 216. (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States) as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

* * * * *

Treasury Regulations 64 (1933 ed.), relating to he capital stock tax under Section 215 of the ational Industrial Recovery Act:

ART. 24. *Adjusted declared value.*—Pursuant to the foregoing provisions of the Act

each domestic corporation is required to declare a value for its entire capital stock as of the close of the last income-tax taxable year ending on or prior to June 30, 1933, or as of the date of organization in the case of a corporation having no income-tax taxable year ending on or prior to that date. This value once having been declared may not subsequently be changed either by the corporation or by the Commissioner.

It should be borne in mind that the original declared value will not only be used as the basis of payment of the capital stock tax for the first taxable year ended June 30, 1933, but that it will also be a primary factor in the computation of capital stock taxes for later years and the excess-profits tax imposed by section 216 of the Act, which reads as follows:

* * * * *

Treasury Regulations 64 (1934 ed.), relating to the capital stock tax under Section 701 of the Revenue Act of 1934:

ART. 41. *Definitions.*—As used in this chapter the term—

(a) *Original declared value* means the value of the capital stock as first declared by the corporation in its capital stock tax return for the first taxable year.

* * * * *

(d) *First return* means the first capital stock tax return filed by a corporation for its first taxable year.

ART. 42. *Original declared value.*—(a) In its first return (see article 41 (d)) a corporation subject to the tax must declare a definite value for its capital stock. Extreme care should be exercised by the corporation

in making this original declared value, for the reason that when the value has been declared such value cannot be changed, amended, or corrected, either by the corporation or by the Commissioner; when the right to declare such original declared value has been exercised, the right does not recur. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 702 of the Revenue Act of 1934.

(b) In the making of its original declared value a corporation is not bound by any declaration of value made by it in a return filed under the provisions of section 215 of the National Industrial Recovery Act. The corporation may exercise unrestricted judgment and discretion in determining the value to be declared for its capital stock in its first return.

Treasury Regulations 64 (1936 ed.), relating to the capital stock tax under Section 105 of the Revenue Act of 1935:

ART. 21. *Definitions.*—As used in these regulations—

* * * * * *

(i) The term "original declared value" means the value of the capital stock of a domestic corporation, or the value of the capital employed by a foreign corporation in its business in the United States, as declared by the corporation in its first return for its first taxable year.

(l) The term "first return" means the first capital stock tax return filed by a corporation for its first taxable year under section 105.

ART. 44. *Original declared value.*—(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. "First return" means the first capital stock tax return filed by a corporation for its first taxable year under section 105. Extreme care should be exercised in making this original declared value, for the reason that if a return has been filed disclosing a declared value, such value cannot be changed, amended, or corrected, either by the corporation or by the Commissioner. A subsequent return declaring a different value, even though filed before the expiration of the prescribed period, is therefore not acceptable under the statute. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935.

* * * * * *

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 176.

HAGGAR COMPANY, PETITIONER,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMICUS CURIAE.

THEODORE B. BENSON,
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INDEX.

	PAGE.
Petition for Leave to File Brief as Amicus	1
Brief of Amicus Curiae	1
Preliminary Statement	3
The Argument	4

CITATIONS.

Cases:	
Philadelphia Brewing Company *v.* United States, —— Ct. Cl. ——, 27 Fed. Supp. 583	5
C. H. Mead Coal Company *v.* Commissioner, 106 Fed. (2d) 388	4
Statutes:	
Section 216 (a)	4
Section 215 (f)	4

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 176.

HAGGAR COMPANY, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF AMICUS CURIAE.

The undersigned respectfully petitions this Honorable Court for leave to file a brief as amicus curiae in the above-entitled cause. The Solicitor General and counsel for the petitioner have assented in writing, as indicated by letters filed with the Clerk of this Court.

This application is made by the undersigned as counsel for the petitioner in the case of *Philadelphia Brewing Company* v. *United States of America*, now pending in the Court of Claims of the United States on defendant's motion for new trial.

Respectfully submitted,

THEODORE B. BENSON.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 176.

HAGGAR COMPANY, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF AMICUS CURIAE.

Preliminary Statement.

This brief is filed in behalf of Philadelphia Brewing Company, plaintiff in a suit against the United States in the Court of Claims and decided in its favor —— Ct. Cl. ——, 27 Fed. Supp. 583, motion for new trial denied and second motion filed November 8, 1939.

In that case the plaintiff filed a capital stock tax return on August 4, 1933, and therein reported the declared value of its capital stock in the amount of $1,500,000.00 and the capital stock tax in the amount of $1,500.00. The return was prepared by the plaintiff's president, who did not have before him an accurate statement of the earnings. On September 23, 1933, and within the time allowed for filing capital stock tax returns the plaintiff prepared a second return in which the declared value of the capital stock, determined by an accountant on the basis of actual earnings, was stated in the amount of $3,499,999.00 and the capital stock tax in the amount of $3,499.00. The return, together with the plaintiff's check in the amount of $1,999.00 were mailed to the Collector of

Internal Revenue. The second return together with the check in the amount of $1,999.00 were returned to the plaintiff by the Collector with the explanation that he would not accept "an amended return."

The suit filed by the plaintiff in the Court of Claims is for the refund of $11,420.13 excess profits and income taxes and interest paid for the calendar year 1930. The question presented to the Court of Claims for decision is the amount of the adjusted declared value of the plaintiff's capital stock to be used as the basis for determining the excess profits tax, as in Haggar Company.

THE ARGUMENT.

Section 216 (a) of the National Industrial Recovery Act imposes an excess profits tax on such portion of the net income as is in excess of a stated percentage of the adjusted declared value of the plaintiff's capital stock tax, "determined as provided in Section 215" of the Act.

The provision of Section 215 (f) is that the adjusted declared value shall be the value as declared by the corporation in its first return under this section. (Which declaration of value can not be amended.) The United States Circuit Court of Appeals for the Fifth Circuit in the instant case construed the provision in Section 215 (f) to mean that during the period allowed for filing the return and before the due date thereof the plaintiff was not entitled to correct or amend the declaration of value. The Court in reaching its conclusion necessarily ignored the "return" and the provisions of subsection (d) in which the requisites of the return are stated and in which the time for filing the return is likewise stated. The error of the Court of Appeals for the Fifth Circuit results from the failure of the Court to give full consideration to the several provisions in Section 215 and the failure of the Court to hold that the return mentioned in subparagraph (f) is the same return that under subparagraph (d) was not due to be filed until September 29, 1933, after the time the plaintiff sought to correct the declared value of its capital stock.

In *C. H. Mead Coal Company* v. *Commissioner*, 106 Fed.

(2d) 388, the United States Court of Appeals, following and approving the decision of the Court of Claims in *Philadelphia Brewing Company* v. *United States*, reversed the Board of Tax Appeals and held that, prior to the due date of the return, corrections might be made.

The opinion of Judge Littleton in *Philadelphia Brewing Company* v. *Commissioner*, covers the question so fully that it is believed that little can be added thereto. The following is quoted from the opinion:

> "This declared value, which was set forth in a corrected capital stock tax return, was made and the corrected return was filed with the collector September 23, 1933, before the expiration of time allowed by the statute and the regulations for filing the 1933 return and for declaring the value of capital stock for its first taxable year for the purpose of the capital stock and excess-profits tax imposed by sections 215 and 216. The time within which to make its declaration of value of its capital stock did not expire until September 29, 1933, and we think, in the circumstances, the proper interpretation of the statute, in the light of the facts and the reports of the Congressional committees is that plaintiff could, before the expiration of the time for filing its capital stock tax return, proceed to file with the Commissioner its final and corrected declaration of value of its capital stock in a corrected capital stock tax return, even though the corporation had filed a capital stock tax return in which a different value had been declared.
>
> "With respect to the first taxable year in which the statute required the corporation to make a declaration of the value of its capital stock, we think it is clear that the statute intended that a taxpayer should have the right until the expiration of the time for filing its capital-stock tax return for that year to make its declaration of the value of its capital stock which was to be thereafter binding and used as a basis for the determination of the excess-profits tax in its first and subsequent income-tax years ending after the close of the first capital-stock tax year. From this the reference in subdivision (f) of section 215 of the National Industrial Recovery Act with respect to 'the value as declared by the corporation in its first return under this section,' should be interpreted to mean the value of the capital stock as finally declared by the corporation

for its capital-stock taxable year within the time allowed by statute and the regulations for making its capital-stock tax return for such year. This interpretation conforms to the declared purpose of the Act.

"In the Conference Report on Section 701 of the Revenue Act of 1934, which carried forward the provisions of section 215 of the National Industrial Recovery Act (Congressional Record, Vol. 78, Part 7, p. 7827), it was said by the managers on behalf of the House of Representatives that 'For the first year the tax is measured by the value of the capital stock as declared by the corporation as of the close of its last taxable year ending on or before June 30, 1934. The value of the capital stock having been declared for the first year, such value may not be subsequently amended.' Inasmuch as the primary purpose of the statute was to require the taxpayer to make a declaration of the value of its capital stock at the close of its last capital-stock tax year ending on or before June 30, 1934, and to be subsequently bound thereby in subsequent capital-stock tax years and each income-tax year ending after the close of the first taxable capital-stock year, no reasonable rule of interpretation requires the conclusion that the corporation may not, within the time allowed for filing a capital stock-tax return for the first year, declare the value of its stock upon which it intends to stand and be bound in subsequent years in a timely corrected or amended return disclosing a declared value different from the value previously stated in a capital stock-tax return filed for such year. *Glenn* v. *Oertel Company*, 97 Fed. (2d) 495. The statute was not dealing specifically with returns as such, but with value and taxable years."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 176.—October Term, 1939.

Haggar Company, Petitioner, *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

Decision in this case turns on the question whether a capital stock tax return filed pursuant to § 215 of the National Industrial Recovery Act of 1933, 48 Stat. 195, 207, may be amended within the time fixed for filing the return.

Sections 215 and 216 of the National Industrial Recovery Act impose interrelated taxes on domestic corporations, namely an annual capital stock tax and an annual tax on profits in excess of 12½ per cent of the capital stock, calculated on the basis of the value of the capital stock as fixed by the corporation's return for the first year in which the tax is imposed.

Section 215(a) imposes on domestic corporations an annual tax with respect to carrying on or doing business for any part of the taxable year at the rate of "$1 for each $1,000 of the adjusted declared value of its capital stock." Section 215(f) provides that "For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. . . . For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value" as changed by certain prescribed capital adjustments occasioned by increases and decreases of capital occurring after "the date as of which the original declared value was declared." Section 216(a) imposes an annual tax upon

so much of the net income of a corporation taxable under § 215(a) as is in excess of 12½ per cent of the "adjusted declared value of its capital stock . . . as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) . . . ."

It will be observed that by § 215(a) and (f) the declared value of capital stock which is made the basis of computation of both taxes is not required to conform either to the actual or to the nominal capital of the taxpaying corporation; and that the declared value for the first taxable year, with the addition or subtraction of specified items of subsequent capital gains or losses is made the basis of the computation of both taxes in later years. The taxpayer is thus left free to declare any value of capital stock for its first taxable year which it may elect, but since the declared value for the first year is a controlling factor for the computation of taxes for later years, the statute provides that the declaration once made cannot be amended. Because of the method of computation, increase or decrease in the declared value of capital, and of the corresponding tax, produces, as the case may be, a decrease or an increase in the tax on excess profits.

In August, 1933, petitioner, a Texas corporation, mistakenly believing that it was required to state the par value of its issued capital stock in its tax return, filed a timely return for the year ending June 30, 1933, declaring the value of its entire capital stock to be $120,000 and paid the tax of $120. The date for filing returns for that year having been extended to September 29, 1933, T. D. 4368, 4386, petitioner before that date filed an amended return, declaring the value of its capital stock to be $250,000. On March 15, 1934, petitioner filed its income and excess profits tax return for the calendar year 1933. The Commissioner, having refused to accept the amended capital stock return, gave notice of a deficiency in the excess profits tax calculated upon the basis of the capital stock value of $120,000 as declared in petitioner's original return.

The Board of Tax Appeals determined that petitioner's capital stock and excess profits tax should be computed on the basis of $120,000 capital stock value as originally stated instead of $250,000 stock value declared in its amended return, found a deficiency, and entered its order accordingly. 38 B. T. A. 141. The Circuit Court of Appeals for the Fifth Circuit affirmed, holding that § 215(f) by its terms precluded

any amendment of the tax return for the first year even though made within the time allowed for filing the return. 104 F. (2d) 24. We granted certiorari October 9, 1939, to resolve a conflict of the decision below with that of the Court of Appeals for the Sixth Circuit in *Glenn* v. *Oertel Co.*, 97 F. (2d) 495, and that of the Court of Claims in *Philadelphia Brewing Company* v. *United States*, 27 Fed. Supp. 583.

The Commissioner founds his argument in support of the decision below upon a literal reading of the introductory sentence of § 215(f) already quoted, which, he argues, precludes even a timely amendment of the tax return for the first year, and upon the administrative and Congressional interpretation of the statute. He insists that the phrase "first return" in the clause "declared value shall be the value as declared by the corporation in its first return under this section (which declaration of value cannot be amended)", means the first paper filed by the taxpayer as a return, and that these words plainly forbid any amendment of the declared value of the capital stock, even though made within the time allowed for filing the return.

In making these contentions the Commissioner concedes that the amount of the declared value of capital fixed for the first year is a matter of indifference to the Government since the statute leaves the taxpayer free to declare any amount which its fancy may choose and that for any reduction in capital stock tax effected by the declaration of a low value of the capital stock there is an accompanying increase in excess profits taxes. He concedes that if petitioner had filed but a single return on the date of filing the amended return, stating the value of the capital stock as $250,000 instead of $120,000, the Government would have been concluded by the taxpayer's declaration and that it has long been the practice of the department, in the cases of other types of tax to accept an amended return, filed within the period allowed for filing returns, as the return of the taxpayer for the taxable year. He concedes also, as he logically must, that the argument leads to the conclusion that a mistake in the declaration of value whether of law or of fact, however serious and excusable, cannot be corrected by a timely amendment of the return.

All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose. *Hawaii* v. *Mankichi*, 190 U. S. 197; *United States* v. *Katz*, 271 U. S. 354; *Sorrells*

v. *United States*, 287 U. S. 435, 446; *Burnet* v. *Guggenheim*, 288 U. S. 280, 285; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315, 332-3. Here the purpose of the statute is unmistakable. It is to allow the taxpayer to fix for itself the amount of the taxable base for purposes of computation of the capital stock tax, but with the proviso that the amount thus fixed for the first taxable year shall be accepted, with only such changes as the statute prescribes for the purpose of computing the capital stock and excess profits taxes in later years. Congress thus avoided the necessity of prescribing a formula for arriving at the actual value of capital for the purpose of computing excess profits taxes, which had been found productive of much litigation under earlier taxing acts, see Sen. Rep. 52, 69th Cong., 1st Sess., pp. 11-12; cf. *Ray Consolidated Copper Co.* v. *United States*, 268 U. S. 373, 376. At the same time it guarded against loss of revenue to the Government through understatements of capital, by providing for an increase in excess profits tax under § 216 ensuing from such understatements.

It is plain that none of these purposes would have been thwarted and no interest of the Government would have been harmed had the Commissioner, in conformity to established departmental practice, accepted the petitioner's amended declaration. It is equally plain that by its rejection petitioner has been denied an opportunity to make a declaration of capital stock value which it was the obvious purpose of the statute to give, and that denial is for no other reason than that the declaration appeared in an amended instead of an unamended return. We think that the words of the statute, fairly read in the light of the purpose, disclosed by its own terms, require no such harsh and incongruous result.

Section 215 nowhere mentions amendment of returns or amended returns. It speaks of "declared value" for the first tax year and provides that the "declaration of value" cannot be amended. The "declaration of value" is that of the corporation in its "first return under this section". The "first return" as the context shows is the return for the first tax year of the taxpayer and the characterization of the return as "first" is obviously used to distinguish the return made for the first year from the return "for any subsequent year" in which the "adjusted declared value" is required by the same section to conform to a formula based on the "declared value" for the first year and which, for that reason, "cannot be amended".

"First return" thus means a return for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a timely amended return for that year. A timely amended return is as much a "first return" for the purpose of fixing the capital stock value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first tax year. *Glenn* v. *Oertel Co., supra; Philadelphia Brewing Company* v. *United States, supra;* see also, similarly construing the phrase "first return" under § 114(b)(4) of the Revenue Act of 1934, 48 Stat. 680, 710; *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, 390; cf. *Pacific National Co.* v. *Welch*, 304 U. S. 191, 194. Thus read the statute gives full effect to its obvious purposes and to the evident meaning of its words. To construe "first return" as meaning the first paper filed as a return, as distinguished from the paper containing a timely amendment, which, when filed is commonly known as the return for the year for which it is filed, is to defeat the purposes of the statute by dissociating the phrase from its context and from the legislative purpose in violation of the most elementary principles of statutory construction.

Article 24 of Treasury Regulations 64 (1933 ed.), under § 215(f) of the National Industrial Recovery Act, in force when the petitioner filed its amended return, did not call for any different construction from that which we have indicated is the correct one. The article made no mention of the "first return". It pointed out merely that the original declared value would be the basis of the tax for the first and later years, and stated "This value once having been declared may not subsequently be changed either by the corporation or by the commissioner." This evidently refers to the parenthetical clause of § 215(f) "which declaration cannot be amended" which phrase concededly does not preclude an effective declaration of value in a timely amended return.[1]

Sections 215 and 216 of the National Industrial Recovery Act were reenacted as §§ 701 and 702 of the 1934 Revenue Act, 48 Stat. 680, 769, 770. That act, § 703, amended the National Industrial

[1] The Government concedes in its brief that the parenthetical clause "which declaration cannot be amended" continued in the capital stock tax section, § 601, of the 1938 Revenue Act, 52 Stat. 447, 565, does not preclude an effective declaration of value in a timely amended return for the first tax year. If the phrase "first return" in § 215(f) had that effect, then the parenthetical phrase concededly prohibiting amendments in tax returns of later years would have been superfluous.

Recovery Act so as to provide that the capital stock tax and excess profits tax imposed by §§ 215 and 216 of the act last mentioned should not apply respectively to any taxpayer in any year except the years ending June 30, 1933 and June 30, 1934. The amended Regulations 64 (1934 ed.), relating to §§ 701 and 702 of the Revenue Act of 1934, are prefaced with the statement "It must constantly be borne in mind that these regulations relate only to the tax imposed by § 701 of the Revenue Act of 1934. With respect to the tax imposed by § 215 of the National Industrial Recovery Act consult Regulations 64, edition of 1933". This warning was repeated in Regulations 64, 1936 edition, under the corresponding §§ 105 and 106 of the 1935 Revenue Act, 49 Stat. 1014, 1017-1019.

Since the regulations under the Revenue Acts for 1934 and 1935 are thus made inapplicable to the taxpayer's stock return under the National Industrial Recovery Act for the year ending June 30, 1933, they are without force for present purposes except as they are persuasive commentaries on the meaning of the language of § 215(f) of the National Industrial Recovery Act which was carried forward into later revenue acts. Article 41(d) of Treasury Regulations 64, published under the 1934 Act, declared that "First return means the first capital stock tax return filed by a corporation for its first taxable year", a definition which was continued in Article 44 of Regulations 64 (1936 ed.), under the corresponding § 105 of the Revenue Act of 1935. Article 44 of the latter regulation for the first time informed taxpayers that an effective declaration of value for the first tax year could not be made in a timely amended return, saying, "A subsequent return declaring a different value, even though filed before the expiration of the prescribed period, is therefore not acceptable under the statute."

On the argument the Commissioner admitted that this ruling served no administrative or governmental convenience or purpose apart from compliance with the supposed command of the statute. There is thus a complete absence of those reasons which ordinarily lead courts to give persuasive force to an administrative construction and which justify their acceptance of it in preference to their own. The regulations have not been consistent in their interpretation of the statute and do not embody the results of any specialized departmental knowledge or experience. Cf. *Brewster* v. *Gage*, 280 U. S. 327, 336; *Sanford* v. *Commissioner of*

Internal Revenue, No. 34, October term, 1939, decided November 6, 1939. No one, not even the Government, will be prejudiced by its rejection, and as we have said the construction flies in the face of the purposes of the statute and the plain meaning of its words. Judicial obeisance to administrative action cannot be pressed so far.

It is said that Congress, by the change of the language of the capital stock provisions adopted in the 1938 Revenue Act has attributed to the earlier statute the same meaning as that ascribed to it by the administrative construction. It is familiar doctrine that Congress, by reenacting a section of the Revenue Act without change, approves and adopts a consistent administrative construction of it. But here the argument is that by amendment of the statute, which would preclude such a construction in the future, Congress has also declared that the departmental construction was that intended by the earlier Congress which enacted the statute.

Section 601 of the 1938 Act, 52 Stat. 447, 565, in addition to other changes in the capital stock and excess profits tax provisions, prescribed that the "adjusted declared value" should be determined with respect to three year periods, beginning with the year ending June 30, 1938, and denominated the first year of each period a "declaration year." Section 601(f)(2) provided that the declared capital stock value for purposes of the tax shall be the value as declared by the corporation "in its return for such declaration year (which declaration of value cannot be amended)". Since, under the new legislation, the return for the declaration year for each three-year period and not that for the first tax year of the taxpayer is controlling, there was no occasion for repeating the phrases "first year" and "first return" which had appeared in the earlier legislation and the new section dropped from the statute the words which had given rise to the earlier administrative construction. This was pointed out by the house committee report recommending the amendment,[2]

[2] "The new section also alleviates the rigid provision of section 105(f) of the 1935 act that the valuation shall be as declared by the corporation in its 'first' return. Errors of calculation or other errors sometimes occur in first returns, and denial of all opportunity for correction appears unduly restrictive. Accordingly, the word 'first' as it appears the second time in section 105(f) of the 1935 act, as amended, is eliminated from the corresponding language appearing in subsection (f) (2) of the new section. This will serve to give a corporation the right, so long as it acts within the time allowed for filing its return (including the last day of any extension period) for the year for which a declaration of value is required, to file subsequent returns for that year showing a different valuation, the valuation shown by the last timely return being binding." H. Rept. 1860, Committee on Ways and Means, 75th Cong., 3rd Sess., p. 62.

stating that the change would serve to permit the taxpayer to amend its declaration by timely amendment of the return for the declaration year and adding, "denial of all opportunity for correction appears unduly restrictive."

It must be assumed that Congress was aware through its committees of the change in the regulations which in 1936 had construed the statute as precluding an effective declaration in a timely amended return, and of the litigation then pending in this case and in *Glenn* v. *Oertel, supra*, in which the departmental construction had been challenged as "unduly restrictive." In the face of the legislative expression of dissatisfaction with the earlier statute as construed, Congressional purpose to declare that such was the intended meaning is not to be inferred merely from the fact that the amendment providing for the future said nothing as to the past. If we are to draw inferences it would seem as probable that Congress was content to leave the problems of the past to be solved by the courts where they were then pending, rather than to preclude their solution there. Action so ambiguous in its implications as to the past is wanting in that certainty and evident purpose which would justify its acceptance as a legislative declaration of what an earlier Congress had intended rather than an effort to make clear that which had been rendered dubious by unwarranted administrative construction. Cf. *Jordan* v. *Roche*, 228 U. S. 436, 445; *Helvering* v. *New York Trust Co.*, 292 U. S. 455; *Noble* v. *Oklahoma City*, 297 U. S. 481, 492. Retroactive declarations of legislative intent, prejudicial to those who have acted under an earlier statute whose construction seems clear, it would seem, ought not to be implied more than the legislative intention to give retroactive operation to a new statute. See *Hassett* v. *Welch*, 303 U. S. 303, 314 and cases cited; cf. *Noble* v. *Oklahoma City, supra.*

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.